No. 17-742	
Title:	**Mary Anne Sause, Petitioner** **v.** **Timothy J. Bauer, et al.**
Docketed:	November 20, 2017
Linked with 17A252	
Lower Ct:	United States Court of Appeals for the Tenth Circuit
Case Numbers:	(16-3231)
Decision Date:	June 20, 2017

DATE	PROCEEDINGS AND ORDERS
Aug 31 2017	Application (17A252) to extend the time to file a petition for a writ of certiorari from September 18, 2017 to October 18, 2017, submitted to Justice Sotomayor.
Sep 06 2017	Application (17A252) granted by Justice Sotomayor extending the time to file until October 18, 2017.
Sep 22 2017	Application (17A252) to extend further the time from October 18, 2017 to November 17, 2017, submitted to Justice Sotomayor.
Sep 25 2017	Application (17A252) granted by Justice Sotomayor extending the time to file until November 17, 2017.
Nov 17 2017	Petition for a writ of certiorari filed. (Response due December 20, 2017) **Petition** **Appendix** **Certificate of Word Count** **Proof of Service**
Nov 22 2017	Blanket Consent filed by Petitioner, Mary Anne Sause **Blanket Consent**
Dec 08 2017	Motion to extend the time to file a response from December 20, 2017 to January 19, 2018, submitted to The Clerk. **Main Document** **Proof of Service**
Dec 14 2017	Motion to extend the time to file a response is granted and the time is extended to and including January 19, 2018.
Dec 20 2017	Brief amicus curiae of State of Texas filed. **Main Document** **Certificate of Word Count** **Proof of Service**

Dec 20 2017	Brief amicus curiae of Former Federal Prosecutors filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Jan 19 2018	Brief of respondents Timothy J. Bauer, et al. in opposition filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Feb 06 2018	Reply of petitioner Mary Anne Sause filed. **Main Document** **Certificate of Word Count** **Proof of Service**
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Jun 28 2018	Petition GRANTED. Judgment REVERSED and case REMANDED. **Opinion** per curiam. (Detached **Opinion**)
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No. 17-___

IN THE

Supreme Court of the United States

MARY ANNE SAUSE,

Petitioner,

v.

TIMOTHY J. BAUER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Law-enforcement officers stopped Mary Anne Sause from praying silently in her own home—not to further any legitimate law-enforcement interest, but "so they could harass her." App. 7a. The Tenth Circuit correctly "assume[d]" this conduct "violated Sause's rights under the First Amendment." App. 6a–7a.

Yet the Tenth Circuit nevertheless granted qualified immunity to the officers, solely on the ground that their alleged conduct was so obviously unconstitutional that there is no prior case law involving similar facts. *See, e.g.*, App. 8a (granting qualified immunity because "Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here").

Does the Tenth Circuit's holding conflict with *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), which "expressly rejected a requirement that previous cases be 'fundamentally similar'" or involve "'materially similar' facts"? And does this error warrant summary relief? *See, e.g.*, *Tolan v. Cotton*, 134 S. Ct. 1861 (2014) (relying on *Hope*, 536 U.S. 730).

PARTIES TO THE PROCEEDING

Petitioner is Ms. Mary Anne Sause, who was the plaintiff–appellant in the Tenth Circuit.

Respondents, who were defendants–appellees in the Tenth Circuit, are:

Timothy J. Bauer, Chief of Police of Louisburg, Kansas; Jason Lindsey, Police Officer of Louisburg, Kansas; Brent Ball, Police Officer of Louisburg, Kansas; Ron Anderson, Former Chief of Police of Louisburg, Kansas; Lee Stevens, Former Louisburg, Kansas Police Officer; Marty Southard, Mayor of City of Louisburg, Kansas; Travis Thompson, Former Mayor of City of Louisburg, Kansas.[1]

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[1] Before this Court—as before the Tenth Circuit—Ms. Sause challenges the dismissal of her claims against only Stevens and Lindsey. App. 5a n.1.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Mary Anne Sause respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit (App. 1a–19a) is reported at 859 F.3d 1270. The district court's memorandum and order (App. 20a–34a) is unreported, but available at 2016 WL 3387469.

JURISDICTION

The U.S. Court of Appeals for the Tenth Circuit entered its judgment (App. 35a) on June 22, 2017. Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including November 17, 2017. *See* No. 17A252. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

42 U.S.C. § 1983 provides, as relevant here:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

INTRODUCTION

This case presents one simple question: Would a reasonable police officer have known that forcing a citizen to stop praying silently in her home—absent *any* legitimate justification whatsoever—violated the First Amendment?

To ask that question is to answer it: "The principle that government may not . . . suppress religious belief or practice is so well understood that few violations are recorded in our opinions." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993).

Yet, that is precisely what Ms. Sause alleged in her complaint: Officers Stevens and Lindsey were "at her home while investigating a noise complaint." App. 3a. They told her that "the Constitution and Bill of Rights were 'nothing, [] just a piece of paper' that '[d]oesn't work here,'" and that "she was 'going to jail,' and, although they did not yet know why she would be going to jail, that her bond would be $2,000." App. 18a (Tymkovich, C.J., concurring) (alterations in original). "Understandably frightened" by the officers' "obviously unprofessional" conduct, Ms. Sause sought and received permission to pray. App. 3a–4a, 9a.

The officers then "interrupt[ed] their investigation," App. 8a, and "demanded that she '[g]et up' and '[s]top praying' only to tell her that she 'need[ed] to move from here,' 'to move back where [she] came from . . . because no one like[d] [her] here.'" App. 18a–19a (Tymkovich, C.J., concurring) (alterations in original). Lest there be any doubt, "issuing that command d[id] nothing to further their investigation." App. 7a, 9a ("they ordered her to stop praying so they could harass

her"). *See also* App. 19a (Tymkovich, C.J., concurring) ("Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose.").

The Tenth Circuit nevertheless ruled that the officers were entitled to qualified immunity—because their alleged conduct was so egregiously unconstitutional that no court "has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a.

In doing so, the Tenth Circuit fundamentally misapprehended not only this Court's qualified-immunity jurisprudence, but the very purpose of qualified immunity itself. As this Court has explained, "qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Accordingly, "officials can still be on notice that their conduct violates established law *even in novel factual circumstances*." *Id.* at 741 (emphasis added) (rejecting "requirement that previous cases be 'fundamentally similar'" or have "'materially similar' facts").

The Tenth Circuit made two key rulings that, taken together, demonstrate that qualified immunity is not warranted: First, "it was clearly established that [Ms. Sause] had a 'right to pray in the privacy of [her] home free from governmental interference,' at least in the absence of 'any legitimate law enforcement interest.'" App. 7a. Second, the officers "ordered her to stop praying so they could harass her." App. 7a, 9a ("that command d[id] nothing to further their investigation").

In other words, the Tenth Circuit's own opinion demonstrates both that the officers had "fair warning"

that it was unlawful to interfere with Ms. Sause's prayer absent some legitimate law-enforcement interest and that, according to Ms. Sause's allegations, the officers did precisely that. *See Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) ("'[T]he salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'") (alterations in original) (quoting *Hope*, 536 U.S. at 741).

This fundamental misapprehension of this Court's qualified-immunity jurisprudence warrants the special remedy of summary reversal. *See Tolan*, 134 S. Ct. 1861. Alternatively, the Court should grant the petition for a writ of certiorari, set the case for briefing, and reverse.

STATEMENT OF THE CASE

1. "Obviously unprofessional" is how the Tenth Circuit described the officers' alleged conduct. App. 9a. They "acted with extraordinary contempt of a law abiding citizen" and "were more preoccupied with harassing Ms. Sause than with conducting a legitimate police investigation." App. 17a–18a (Tymkovich, C.J., concurring).

According to Ms. Sause's complaint, Officers Lee Stevens and Jason Lindsey arrived at Ms. Sause's apartment the evening of November 22, 2013, in response to a noise complaint. App. 3a. Ms. Sause had been listening to a talk-radio show.

Ms. Sause initially declined to grant the officers entry, because they had not identified themselves and her inoperable peephole prevented her from seeing who was at the door. App. 3a. The officers later returned and again demanded entry. After Ms. Sause

complied, the officers angrily asked why she initially refused to open the door. App. 3a. Ms. Sause showed them a copy of the Constitution and Bill of Rights that she keeps on display by her front door. App. 3a.

The officers then "told her the Constitution and Bill of Rights were 'nothing, [] just a piece of paper' that '[d]oesn't work here.'" App. 18a (Tymkovich, C.J., concurring) (alterations in original). After Stevens left the apartment (to speak with Ms. Sause's neighbor), Lindsey "told her to 'get ready' because she was 'going to jail,' and, although they did not yet know why she would be going to jail, that her bond would be $2,000." App. 18a.

"Understandably frightened," Ms. Sause sought and received Lindsey's permission to pray. She "knelt down on . . . [her] prayer rug" and began praying silently. App. 3a–4a (alterations in original).

"While Sause was still praying, Stevens returned and asked what she was doing." App. 4a. "Lindsey laughed and told Stevens 'in a mocking tone' that Sause was praying." App. 4a.

Stevens then "demanded that she '[g]et up' and '[s]top praying'"—"only to tell her that she 'need[ed] to move from here,' 'to move back where [she] came from . . . because no one like[d] [her] here.'" App. 18a (Tymkovich, C.J., concurring) (alterations in original). *See also* App. 7a–8a (the officers "interrupt[ed] their investigation to order [Ms. Sause] to stop engaging in religiously-motivated conduct" "so they could harass her").

The officers then "flipped through a booklet, seemingly searching for a violation with which to charge Ms. Sause, suggesting they were not going to proceed

with charges for any alleged noise violation." App. 19a (Tymkovich, C.J., concurring). The officers "repeatedly (i.e., three or four times) asked Ms. Sause to show them any tattoos or scars she had, including scars on her chest from a double mastectomy." App. 19a.

Eventually the officers issued Ms. Sause two tickets, which were unrelated to the alleged noise compliant, but instead "for not answering her door when the officers first approached." App. 19a. Only on their way out the door did the officers instruct Ms. Sause to turn down her radio, which had been playing throughout the entire interaction.

2. Proceeding pro se, Ms. Sause sued the officers under 42 U.S.C. § 1983 for violating her First Amendment rights. She sought damages and an injunction, because "the wrongs alleged . . . are continuing to occur at the present time" and because "Lindsey '[t]hreatened [her] again' sometime in March 2015 and '[l]ectured' her that '[f]reedom of [s]peech' means nothing." App. 11a (alterations in original).

The district court granted the officers' motion to dismiss, ruling that forcing Ms. Sause "to stop praying may have offended her," but "does not constitute a burden on her ability to exercise her religion." App. 29a–30a ("[they] merely instructed her to stop praying while the officers were in the middle of talking to her about a noise complaint they had received").

3. On appeal, Ms. Sause argued that the officers violated her clearly established First Amendment rights by forcing her to stop praying solely to harass her.

The Tenth Circuit "assum[ed]" that the officers "violated Sause's rights under the First Amendment

when, according to Sause, they repeatedly mocked her, ordered her to stop praying so they could harass her, [and] threatened her with arrest"—"'all over' a mere noise complaint." App. 6a–7a, 11a ("we assume that Sause's complaint adequately pleads a constitutional violation").

The Tenth Circuit also agreed with Ms. Sause that "it was clearly established that she had a 'right to pray in the privacy of [her] home free from governmental interference,' at least in the absence of 'any legitimate law enforcement interest.'" App. 7a (alteration in original) ("We don't disagree with Sause's articulation of these general rights.").

Despite acknowledging that Ms. Sause alleged that the officers "ordered her to stop praying so they could harass her"—not "to further their investigation," App. 7a, 9a—the Tenth Circuit nevertheless granted the officers qualified immunity, because Ms. "Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a–10a ("because Sause fails to identify—and our independent research fails to yield—any such authority, we . . . agree with the district court that [the officers are] entitled to qualified immunity"). *See also* App. 8a (explaining that "law isn't clearly established unless [a] court can 'identify a case where an officer acting under similar circumstances as [defendant] was held to have violated' [the] relevant constitutional right").

The court also denied Ms. Sause's request for injunctive relief, ruling that her "subjective fears, however genuine, are insufficient to establish standing." App. 14a.

Chief Judge Tymkovich wrote separately to denounce the "reprehensible" nature of the officers' alleged conduct—"the officers here acted with extraordinary contempt of a law abiding citizen and they should be condemned"—and to explain his view that the allegations "fit more neatly in the Fourth Amendment context." App. 17a (Tymkovich, C.J., concurring). As he explained, "although the officers' initial motives may have been legitimate, Ms. Sause's complaint indicates that the situation quickly devolved." Ap. 18a–19a ("If true, Sause's allegations are inconsistent with any legitimate law enforcement purpose capable of justifying . . . the alleged conduct.").

REASONS FOR GRANTING RELIEF

The Tenth Circuit's decision fundamentally misapprehended this Court's qualified-immunity jurisprudence.

The court granted qualified immunity solely because the officers' alleged conduct was so egregiously unconstitutional that no court had addressed "a factual scenario even remotely resembling the one we encounter here." App. 8a, 10a ("Sause fails to identify—and our independent research fails to yield—any such authority.").

But this Court has "expressly rejected a requirement that previous cases be 'fundamentally similar'" or involve "'materially similar' facts." *Hope*, 536 U.S. at 741. Instead, the "'salient question . . . is whether the state of the law' at the time of an incident provided

'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan*, 134 S. Ct. at 1866 (alterations in original) (quoting *Hope*, 536 U.S. at 741).

Had the Tenth Circuit applied the correct standard, it would have denied qualified immunity because any reasonable officer would have known that the officers' alleged conduct was unconstitutional. As the court acknowledged, "it was clearly established" that interfering with a citizen's prayer is unlawful—"at least in the absence of 'any legitimate law enforcement interest.'" App. 7a ("We don't disagree"). And that is precisely what the officers did: they "ordered her to stop praying so they could harass her," and their "command d[id] nothing to further their investigation." App. 7a, 9a. That is, the officers had fair notice that interfering with Ms. Sause's prayer without some legitimate justification was unconstitutional—and the officers allegedly did exactly that.

Summary reversal would allow the Court to clarify the law in these important areas—religious liberty and qualified immunity—while conserving its scarce resources. Given the frequency with which lower courts must grapple with claims of qualified immunity, the Court's guidance is critical to ensure that they do not continue to rely on a qualified-immunity standard that this Court has explicitly rejected.

I. This Case Merits Summary Reversal.

This Court frequently has exercised its "summary reversal procedure . . . to correct a clear misapprehension of the qualified immunity standard." *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004). *See also Mullenix v. Luna*, 136 S. Ct. 305 (2015); *Talyor v. Barkes*,

135 S. Ct. 2042 (2015); *Stanton v. Sims*, 134 S. Ct. 3 (2013). This Court has summarily reversed to remedy not only improper qualified-immunity denials, but also erroneous grants of qualified-immunity. *E.g.*, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017); *Tolan*, 134 S. Ct. 1861.[2] It should do so here as well.

In *Hope*, this Court reversed the Eleventh Circuit for making precisely the same error that the Tenth Circuit made here: granting qualified immunity because there were no "earlier cases with 'materially similar' facts." 536 U.S. at 733, 739 ("This rigid gloss on the qualified immunity standard . . . is not consistent with our cases.").[3] As the Court explained, it reversed because it had both "expressly rejected a requirement that previous cases be 'fundamentally similar'" and made clear "that officials can still be on notice that their conduct violates established law *even in novel factual circumstances*." *Id.* at 741 (emphasis added).

Here, the Tenth Circuit misinterpreted this Court's recent precedents as requiring it to grant

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[2] *See also Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting from the denial of certiorari) ("We have not hesitated to summarily reverse courts for wrongly denying officers the protection of qualified immunity.") (citing cases); *id.* at 1278 (Alito, J., concurring in the denial of certiorari) ("The dissent has not identified a single case in which we failed to grant a similar petition filed by an alleged victim of unconstitutional police conduct.").

[3] *See also United States v. Lanier*, 520 U.S. 259, 269, 272 (1997) (by requiring "a factual situation that is 'fundamentally similar' . . . the Court of Appeals used the wrong gauge in deciding whether prior judicial decisions gave fair warning that [defendants'] actions violated constitutional rights").

qualified immunity "unless [it] can 'identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated' [the] relevant constitutional right." App. 7a–8a (quoting *White v. Pauly*, 137 S. Ct. 548, 552 (2017)). Because Ms. Sause could not "identify a single case" that "found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here," the Tenth Circuit granted qualified immunity. App. 8a, 10a ("because Sause fails to identify—and our independent research fails to yield—any such authority, we conclude that . . . [the officers are] entitled to qualified immunity").

The Tenth Circuit did not cite *Hope*, let alone grapple with its admonition that qualified immunity can be defeated "even in novel factual circumstances," when it explained that qualified immunity was warranted because "this case presents a unique set of facts." App. 8a. *See also* App. 9a–10a & n.8 (questioning "continuing validity" of principle that "obviously egregious" conduct requires "less specificity . . . from prior case law'").

Summary reversal would allow this Court to correct the Tenth Circuit's clear misapprehension of the qualified-immunity standard and to clarify that *Hope* remains good law.

II. QUALIFIED IMMUNITY CAN BE OVERCOME BY CONDUCT SO EGREGIOUS THAT NO PREVIOUS CASE HAS HELD UNLAWFUL THE DEFENDANTS' "PARTICULAR CONDUCT."

Ms. Sause alleged that the officers "ordered her to stop praying so they could harass her." App. 7a; App. 18a–19a (Tymkovich, C.J., concurring) (officers

demanded she stop praying "only to tell her that she 'need[ed] to move from here,' 'to move back where [she] came from . . . because no one like[d] [her] here'") (alterations in original). That is, her "allegations are inconsistent with any legitimate law enforcement purpose capable of justifying . . . the alleged conduct." App. 19a; App. 9a ("that command d[id] nothing to further their investigation").

The Tenth Circuit also agreed that any reasonable officer would have known that it was unconstitutional to interfere with an individual's prayer without some legitimate law-enforcement interest. App. 7a ("it was clearly established" that "interfer[ing]" with "right to pray" was unlawful—"at least in the absence of 'any legitimate law enforcement interest'").

The court nevertheless granted qualified immunity—because Ms. Sause "doesn't identify a single case" involving a "factual scenario" as egregiously unconstitutional as the officers' alleged conduct. App. 8a.[4]

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[4] Lest there by any doubt, even a cursory review of the Tenth Circuit's decision demonstrates that the lack of a case holding the officers' particular conduct unconstitutional was dispositive. *See, e.g.*, App. 8a ("Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here."); App. 10a ("because Sause fails to identify—and our independent research fails to yield—any such authority, we conclude that the law isn't clearly established"); App. 10a ("Sause can *only* satisfy the clearly-established prong by citing a case or cases that make clear 'the violative nature of [the defendants'] *particular* conduct.") (first emphasis added; alteration in original); App. 15a ("defendants are nevertheless entitled to qualified immunity because Sause fails to identify *a case* that 'place[s] the . . . constitutional question beyond debate'") (emphasis added; alterations in original).

That ruling reflects a clear misapprehension of this Court's qualified-immunity jurisprudence. *Cf. Hope*, 536 U.S. at 741 (no qualified immunity if officers had "fair warning that their alleged [conduct] was unconstitutional").

1. The purpose of qualified immunity is "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001).

Accordingly, the "'salient question . . . is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan*, 134 S. Ct. at 1866 (alterations in original) (quoting *Hope*, 536 U.S. at 741). *See also Reichle v. Howards*, 566 U.S. 658, 664–65 (2012) (asking whether "every 'reasonable official would [have understood] that what he is doing violates that right'") (alteration in original).

As this Court emphasized in *Hope*, "officials can still be on notice that their conduct violates established law even *in novel factual circumstances*." 536 U.S. at 741 (emphasis added). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts." *Ibid.*

This is true because "general statements of the law are not inherently incapable of giving fair and clear warning." *Ibid.* Similarly, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question

has [not] previously been held unlawful.'" *Ibid.* (alteration in original) (quoting *Lanier*, 520 U.S. at 270–71).

2. Given the clear and alarming egregiousness of the officers' alleged misconduct here, it is unsurprising that no court has had occasion to declare it unconstitutional. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("The unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason . . . that '[t]he easiest cases don't even arise.'") (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990)).

Yet the Tenth Circuit ruled that the officers were entitled to qualified immunity precisely because Ms. Sause was unable to "identify a single case" finding "a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a, 10a ("because Sause fails to identify—and our independent research fails to yield—any such authority, . . . [the officers are] entitled to qualified immunity").

The Tenth Circuit believed its ruling was compelled by this Court's recent precedents, which it erroneously interpreted as requiring a court to grant qualified immunity "unless [it] can 'identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated' [the] relevant constitutional right." App. 7a–8a (quoting *White*, 137 S. Ct. at 552). *See also* App. 10a ("Sause can only satisfy the clearly-established prong by citing a case or cases" addressing the officers' "*particular* conduct") (quoting *Mullenix*, 136 S. Ct. at 308).

The Tenth Circuit's error stemmed from its misapprehension that *Mullenix* and *White* overruled *sub*

silentio Hope's admonition that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. at 741. *See* App. 9a–10a & n.8 (questioning, in light of *Mullenix*, "continuing validity" of principle that "obviously egregious" conduct requires "less specificity . . . from prior case law") (citing *Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016)).[5]

But neither *Mullenix* nor *White* purported to expressly overrule *Hope* and, as this Court has reminded lower courts, its "decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252–53 (1998).

Nor do *Mullenix* or *White* even call into question *Hope*'s admonition that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. at 741. This Court summarily reversed in those cases because the courts of appeals had relied on qualified-immunity theories that this Court had already rejected. *See*

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[5] *See also Aldaba*, 844 F.3d at 874 n.1 ("To show clearly established law, the *Hope* Court did not require earlier cases with 'fundamentally similar' facts, noting that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances.' . . . But the Supreme Court has vacated our opinion here and remanded for us to reconsider our opinion in view of *Mullenix*, which reversed the Fifth Circuit after finding that the cases it relied on were 'simply too factually distinct to speak clearly to the specific circumstances here.' We also note that the majority opinion in *Mullenix* does not cite *Hope v. Pelzer*. As can happen over time, the Supreme Court might be emphasizing different portions of its earlier decisions.") (internal citations omitted).

White, 137 S. Ct. at 552 ("we have held" that the cases "relied on" by Tenth Circuit "do not by themselves create clearly established law"); *Mullenix*, 136 S. Ct. at 309 ("this Court has previously considered—and rejected—almost th[e] exact formulation of the qualified immunity question" that Fifth Circuit relied on). In short, *Hope*'s central teaching—that certain egregious *factual scenarios* are so clearly unconstitutional that prior precedent on point is unnecessary and unlikely to exist—was not at issue in those cases.

3. Perhaps more importantly, unlike in certain areas of law (the Fourth Amendment, for example), the contours of the Free Exercise Clause are sufficiently clear that less specificity is required to afford officers fair notice. *Compare Brosseau*, 543 U.S. at 199 ("the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application"), *with Lukumi*, 508 U.S. at 523 ("The principle that government may not . . . suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

The "Fourth Amendment's text" and the cases interpreting it "are cast at a high level of generality." *Brosseau*, 543 U.S. at 199. *See also Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) ("The Fourth Amendment provides an example of how qualified immunity functions with respect to abstract rights."). Accordingly, "specificity is especially important in the Fourth Amendment context." *Mullenix*, 136 S. Ct. at 308–09 ("this area is one in which the result depends very much on the facts of each case"). Because it is often "difficult for an officer to know whether a search or seizure will be deemed reasonable given the precise situation encountered" the "dispositive question" in

the Fourth Amendment context is "whether the violative nature of *particular* conduct is clearly established." *Ziglar*, 137 S. Ct. at 1866–67 (quoting *Mullenix*, 136 S. Ct. at 308).

The Free Exercise Clause, on the other hand, is much more concrete—it proscribes government action "prohibiting the free exercise" of religion. U.S. Const. amend. I. *Cf. Groh v. Ramirez*, 540 U.S. 551, 563 (2004) ("Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid."). Similarly, the "general constitutional rule already identified" in the Free Exercise context—that officers cannot burden religious exercise absent some legitimate government interest, *see* Part III.A.2—applies "with obvious clarity" to conduct burdening religious exercise with *no* justification. *Hope*, 536 U.S. at 741. *See Lukumi*, 508 U.S. at 523 ("The principle that government may not . . . suppress religious belief or practice is so well understood that few violations are recorded in our opinions.").

Accordingly, that a free-exercise case may present "a unique set of facts and circumstances," App. 8a, is unsurprising—given that the Free Exercise Clause's contours are so well understood—not an "important indication" that the officers "did not violate a 'clearly established right.'" App. 8a (quoting *White*, 137 S. Ct. at 552).

As this Court explained in *Lanier*, that the "easiest cases don't even arise" does not mean "that if such a case arose, the officials would be immune." 520 U.S. at 271. Put another way,

> some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

Browder v. City of Albuquerque, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.) (citing *Northern v. City of Chicago*, 126 F.3d 1024, 1028 (7th Cir. 1997)). *See also Safford*, 557 U.S. at 377 ("unconstitutionality of outrageous conduct obviously will be unconstitutional"); *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251 (2d Cir. 2001) ("in many instances, 'the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with' the well-recognized applications of the right at issue on the part of government actors") (quoting *Eberhardt v. O'Malley*, 17 F.3d 1023, 1028 (7th Cir. 1994)).

* * *

Ms. Sause alleged that the officers "ordered her to stop praying so they could harass her," App. 7a—blatantly disregarding a principle "so well understood that few violations are recorded." *Lukumi*, 508 U.S. at 523. Yet, the Tenth Circuit granted qualified immunity precisely because no court "has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a. That ruling fundamentally misapprehends this Court's qualified-immunity jurisprudence and

should be summarily reversed. *Cf. Hope*, 536 U.S. at 741 (denying qualified immunity where "the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution").

III. Even without Precedent Involving Similarly Egregious Facts, The Officers Had Clear Notice That Commanding a Citizen to Stop Praying Silently in Her Home—Absent Any Justification—Was Unconstitutional.

A. It Was Clearly Established That Government Actors Cannot Interfere with Religious Exercise Absent a Legitimate Justification.

Ms. Sause explained below that "it was clearly established that she had a 'right to pray in the privacy of [her] home free from governmental interference,' at least in the absence of 'any legitimate law enforcement interest.'" App. 7a (alteration in original). The Tenth Circuit "d[id]n't disagree," App. 7a—for good reason.

1. It is axiomatic that prayer—a quintessential form of religious exercise—is protected from governmental interference by the Free Exercise Clause. *See Lukumi*, 508 U.S. at 521 ("that government may not . . . suppress religious belief *or practice* is so well understood that few violations are recorded in our opinions") (emphasis added).[6]

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[6] Courts throughout the country and throughout history have recognized that the Free Exercise Clause protects the right to pray from unjustified governmental interference. *See, e.g.*,

In determining whether the government has impermissibly interfered with a citizen's First Amendment rights by substantially burdening her religious exercise, courts focus "on the coercive impact of the government's actions." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (2014) (Gorsuch, J.) ("the inquiry here isn't into the merit of the plaintiff's religious beliefs or the relative importance of the religious exercise"). *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–79 (2014). A burden "rises to the level of being 'substantial' when" the government "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief" or "present[s] an illusory or Hobson's choice where the only realistically possible course of action available . . . trenches on sincere religious exercise." *Yellowbear*, 741 F.3d at 55 (citing *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010), *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), and *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981)). *See also Koger v. Bryan*, 523 F.3d 789, 802 (7th Cir. 2008) ("the prohibition against substantially burdening sincerely held religious beliefs is well-established in Free Exercise Clause cases").[7]

It would have been obvious to any reasonable officer that commanding a citizen to stop praying would

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Chaplinsky v. New Hampshire, 315 U.S. 568, 570–71 (1942) ("Freedom of worship is similarly sheltered" "from invasion by state action"); *McCurry v. Tesch*, 738 F.2d 271, 275 (8th Cir. 1984) ("The right to worship free from governmental interference lies at the heart of the First Amendment."). This fundamental principle is undisputed.

[7] No one has challenged either the sincerity of Ms. Sause's religious beliefs or that her prayer was motivated by those beliefs.

substantially burden her religious exercise by forcing her to stop praying.[8]

2. This Court repeatedly has made clear that government action that substantially burdens a citizen's religious exercise is unconstitutional unless it furthers *some* legitimate government interest. *See, e.g.*, *Lukumi*, 508 U.S. at 531–32; *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). *See also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348–53 (1987).

As this Court reiterated in *Lukumi*, government action that substantially burdens religious exercise must be "justified by a compelling governmental interest" and "narrowly tailored to advance that interest." 508 U.S. at 531–32. *See Koger*, 523 F.3d at 802–03 ("the difficult burden laid on a defendant who must show that its conduct was the 'least restrictive means of achieving some compelling state interest' *has been*

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[8] The officers argued below that their command did not impose a substantial burden because they did not explicitly threaten to arrest Ms. Sause if she failed to comply. But any reasonable officer would have been well aware that his authoritative command was coercive—especially where, as here, the officers "convey a message that compliance with their request[] is required." *Florida v. Bostick*, 501 U.S. 429, 435 (1991). *See also United States v. Flowers*, 336 F.3d 1222, 1226 n.2 (10th Cir. 2003) ("a reasonable person confronted by . . . a command by one of the officers . . . would have believed that he had to . . . submit to the show of authority"); *United States v. Allen*, 813 F.3d 76, 88 (2d Cir. 2016) ("The command of an officer, legally entitled to make an arrest . . . is, and should be, a sufficient exercise of authority to require the suspect to comply."). *Cf. Mack v. Warden Loretto FCI*, 839 F.3d 286, 304 (3d Cir. 2016) ("Although Mack concedes that the officers did not directly command him to cease praying, a burden can be 'substantial' even if it involves indirect coercion to betray one's religious beliefs.").

established for decades") (emphasis added) (quoting *Thomas*, 450 U.S. at 718).

Although the prohibition against substantially burdening religious exercise is "so well understood that few violations are recorded," *Lukumi*, 581 U.S. at 523, several circuit courts have held that officers violated the First Amendment by burdening citizens' religious exercise absent sufficient justification.

In *Fifth Avenue Presbyterian Church v. City of New York*, for example, the Second Circuit ruled that officers who dispersed homeless persons from church property violated the church's free exercise rights because the officers had neither "sufficiently shown the existence of a relevant law or policy that is neutral and of general applicability" that justified their actions nor demonstrated that their actions were "justified by a compelling state governmental interest." 293 F.3d 570, 576 (2d Cir. 2002) (rejecting interest in "preventing the Church from providing inadequate shelter nightly and encouraging homeless persons to avoid a safer, more civilized alternative"). *See also Fifth Ave. Presbyterian Church v. City of New York*, 177 F. App'x 198 (2d Cir. 2006) (affirming permanent injunction granted to church).

In *McTernan v. City of York*, the Third Circuit reversed summary judgment granted to an officer whose threat of arrest prevented a citizen from continuing to engage in religiously motived speech, ruling that the officer had not demonstrated that his actions were "'generally applicable' *and* 'neutral'" or justified by "a compelling government interest." 564 F.3d 636, 647–

51 & n.6 (3d Cir. 2009) (rejecting interest in "promoting traffic safety"). *See also Snell v. City of York*, 564 F.3d 659, 666 & n.8 (3d Cir. 2009) (same).

In *McCurry v. Tesch*, the Eighth Circuit ruled that officers violated the First Amendment by arresting citizens who were praying in a church—even though the officers acted pursuant to an injunction ordering the church to be closed and padlocked because it was used to operate "a school without complying with Nebraska school laws." 738 F.2d 271, 272, 275–76 (8th Cir. 1984) (rejecting interest in "preventing the operation of the unapproved church school"). On a subsequent appeal, the Eighth Circuit emphasized that "absent a court order, no reasonable law-enforcement officer would think that he could carry praying people out of a church without violating their First Amendment rights." *McCurry v. Tesch*, 824 F.2d 638, 641–42 (8th Cir. 1987).[9]

These cases clearly establish two principles that mandate reversal in this case: (1) it is clearly established that when an officer substantially burdens a citizen's religious liberty, he must have a persuasive and specific justification for doing so, and (2) some actions—like carrying praying people out of a church without a court order or ordering a woman to stop praying silently in her home without justification—

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[9] That the Eighth Circuit ultimately granted the officers qualified immunity in *McCurry* is of no moment. There, a court order at least arguably "authorize[d] what these defendants did." 824 F.2d at 641–42. Here, the officers' conduct not only lacked judicial imprimatur but was "inconsistent with any legitimate law enforcement purpose." App. 19a (Tymkovich, C.J., concurring).

are so blatantly unlawful that qualified immunity is inappropriate.

The officers' alleged conduct here would have been obvious to any reasonable officer—under *any* level of scrutiny—for one simple reason. The officers have not demonstrated *any* justification for their actions consistent with Ms. Sause's allegations—let alone a compelling, narrowly tailored justification.[10]

3. The flagrant unlawfulness of the officers' conduct becomes even clearer when one considers cases brought by incarcerated persons: Courts routinely have denied qualified immunity to prison officials who engage in conduct similar to the conduct alleged here. It is disturbing that if Ms. Sause were incarcerated—

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[10] Strict scrutiny is appropriate because the officers have not attempted to "demonstrat[e] that a neutral law of general applicability justifies [their] actions." *Fifth Ave. Presbyterian Church*, 293 F.3d at 575. In addition, Ms. Sause alleged that the officers acted with religious animus—they not only laughed at and mocked her prayer but also explicitly commanded her to "stop praying." App. 7a. *See Brown v. Borough of Mahaffey*, 35 F.3d 846, 849–50 (3d Cir. 1994) ("government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose"). *See also Lukumi*, 508 U.S. at 534, 547.

At a minimum—even assuming the officers' command was neutral and generally applicable—they still must show that it was "a reasonable means of promoting a legitimate public interest." *Bowen v. Roy*, 476 U.S. 693, 707–08 (1986). Given the procedural posture of this case, the officers cannot do even that—as the Tenth Circuit explained. App. 7a, 9a (the officers "ordered her to stop praying so they could harass her"—"not[] to further their investigation"); App. 19a (Tymkovich, C.J., concurring) ("Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose.")

rather than in the privacy of her own home—she likely would have prevailed below.

It is "clearly established" that even in the prison context officers "may not substantially burden inmates' right to religious exercise without *some* justification." *Salahuddin v. Goord*, 467 F.3d 263, 275–76 (2d Cir. 2006) (emphasis added). *See Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir. 1989) ("A prisoner's first amendment right to the free exercise of his religious beliefs may only be infringed to the extent that such infringement is 'reasonably related to legitimate penological interests.'") (quoting *O'Lone*, 482 U.S. at 349, and citing *Cruz v. Beto*, 405 U.S. 319 (1972)). *See also Crowder v. Lash*, 687 F.2d 996, 1004 (7th Cir. 1982) ("A prisoner's right to the free exercise of his religion, limited only by a prison's legitimate security interests, was clearly established during the time Crowder was confined.").[11]

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[11] *See also Barnes v. Furman*, 629 F. App'x 52, 56 (2d Cir. 2015) ("it has been clearly established that burdens on prisoners' free exercise rights must be justified by a legitimate penological interest"); *Hall v. Ekpe*, 408 F. App'x 385, 388 n.3 (2d Cir. 2010) ("it was clearly established at the time of the alleged violation that prison officials may not substantially burden the right of free exercise 'without some justification'"); *Conyers v. Abitz*, 416 F.3d 580, 586 (7th Cir. 2005) ("law was clearly established that prison officials must have a legitimate penological interest before imposing a substantial burden on the free exercise of an inmate's religion, even when that inmate is in disciplinary segregation"); *Ford v. McGinnis*, 352 F.3d 582, 597–98 (2d Cir. 2003) (Sotomayor, J.) ("prior cases make it sufficiently clear that absent a legitimate penological justification, which for present purposes we must assume defendants were without, prison officials' conduct in denying Ford a feast imbued with religious import was unlawful"). *Cf. U.S. ex rel. Jones v. Rundle*, 453 F.2d 147, 149–

Accordingly, courts have repeatedly denied qualified immunity to prison officials who burden a prisoner's religious exercise "absent a legitimate penological justification." *Ford v. McGinnis*, 352 F.3d 582, 597–98 (2d Cir. 2003) (Sotomayor, J.) (denying one religious meal). *See Johnson v. Brown*, 581 F. App'x 777, 779–81 (11th Cir. 2014) (ordering prisoner "to stop praying"); *Arroyo Lopez v. Nuttall*, 25 F. Supp. 2d 407, 409–10 (S.D.N.Y. 1998) (disrupting "prayer when the inmate was praying quietly"). *Cf. Walker v. Fasulo*, 2015 WL 1959190, at *4 (D. Nev. Apr. 29, 2015) ("prevent[ing] Plaintiff from praying" and "threaten[ing] to send Plaintiff to disciplinary housing if he attempted to pray without permission").

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Given that any reasonable prison official would have known that he cannot force an inmate to stop praying without justification, it strains credulity to suggest that the officers here lacked fair notice that forcing Ms. Sause (who was not even under arrest) to stop praying was unlawful—particularly considering that she was in the privacy of her own home. *Cf. Stanley v. Georgia*, 394 U.S. 557, 564–65, 568 (1969); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988).

B. No Reasonable Officer Could Have Believed That Ordering a Citizen to Stop Praying So He Could Harass Her Was Constitutional.

As this Court has framed it, "the appropriate question is . . . whether a reasonable officer could have

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51 (3d Cir. 1971) ("where religious freedoms are curtailed by prison officials, the Government must show compelling justification for such deprivations").

believed" that the alleged conduct was "lawful, in light of clearly established law and the information the officers possessed." *Wilson v. Layne*, 526 U.S. 603, 615 (1999). *See also Tolan*, 134 S. Ct. at 1866 (asking "'whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional'") (quoting *Hope*, 536 U.S. at 741).

1. The Tenth Circuit recognized that "it was clearly established" that "interfer[ing]" with a citizen's "right to pray" was unconstitutional—"at least in the absence of 'any legitimate law enforcement interest." App. 7a. *See also* Part III.A. Ms. Sause plausibly alleged that the officers "ordered her to stop praying so they could harass her," App. 7a—"allegations [that] are inconsistent with any legitimate law enforcement purpose capable of justifying . . . the alleged conduct." App. 19a (Tymkovich, C.J., concurring). And no one would seriously contend that harassment—"obviously unprofessional" conduct that demonstrates "extraordinary contempt of a law abiding citizen"—is a legitimate law-enforcement interest. App. 9a, 17a.

Thus, the only question is whether the officers possessed some information that would have led them to believe that their otherwise egregiously unconstitutional behavior was lawful.

2. "Because this case was resolved on a motion to dismiss, the Court accepts the allegations in the complaint as true." *Hernandez*, 137 S. Ct. at 2005. Accordingly, at this stage in the case, any justification the officers might have had must be evident from the facts in Ms. Sause's complaint.

In the Tenth Circuit's view, the officers' "obviously unprofessional" conduct was permissible because they were "in the midst of a legitimate investigation":

> It certainly wouldn't be obvious to a reasonable officer that, in the midst of a legitimate investigation, the First Amendment would prohibit him or her from ordering the subject of that investigation to stand up and direct his or her attention to the officer—even if the subject of the investigation is involved in religiously-motivated conduct at the time, and even if what the officers say or do immediately after issuing that command does nothing to further their investigation.

App. 9a.

Although there are exigent circumstances that may justify intruding on a citizen's constitutional rights, it is black-letter law that merely being "in the midst of a legitimate investigation" is not such a circumstance.

And, as Ms. Sause's complaint makes clear, the officers faced no exigencies that might otherwise justify infringing upon her right to pray.

There were no concerns for their safety: the officers had already secured Ms. Sause's home, and she was on her knees, silently praying—which they had given her permission to do. App. 4a.[12]

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[12] *Cf. City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775 (2015) (officers faced "dangerous circumstances"; plaintiff "had a weapon and had threatened to use it to kill three people"); *Stanton*, 134 S. Ct. at 4 (officer "fear[ed] for [his] safety"; made "split-second decision") (alterations in original); *Ryburn v. Huff*,

Nothing required the officers to make split-second decisions: they had been at Ms. Sause's home well "beyond the time reasonably required to complete the legitimate police objective justifying the encounter." App. 17a (Tymkovich, C.J., concurring).[13]

There were no concerns about evidence being destroyed: the officers were responding to a noise complaint, for which they allegedly never cited Ms. Sause. App. 19a (officers "issued Ms. Sause tickets for . . . not answering her door when the officers first approached").[14]

And, more importantly, even if being "in the midst of a legitimate investigation" could otherwise justify forcing Ms. Sause to stop praying, the Tenth Circuit explained that their "command d[id] nothing to further their investigation." App. 9a. *See also* App. 18a–19a (Tymkovich, C.J., concurring) (officers "demanded that she '[g]et up' and '[s]top praying' only to tell her that she 'need[ed] to move from here,' 'to move back where [she] came from . . . because no one like[d] [her] here.'") (alterations in original).

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565 U.S. 469, 475 (2012) (officers faced "imminent threat to their safety and to the safety of others").

[13] *Cf. Wood v. Moss*, 134 S. Ct. 2056, 2067 (2014) (circumstances required officers "make singularly swift, on the spot, decisions"); *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014) (officers "forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"); *Anderson v. Creighton*, 483 U.S. 635, 637 (1987) (discussing "presence of exigent circumstances").

[14] *Cf. Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (preventing evidence destruction may justify otherwise unconstitutional search); *Ker v. California*, 374 U.S. 23, 30–40 (1963) (preventing "destruction of contraband" justified "officers' failure to give notice").

In short, taking Ms. Sause's allegations as true, no reasonable officer would have believed that the situation the officers confronted justified their conduct. *See Hope*, 536 U.S. at 738 (denying qualified immunity and emphasizing "clear lack of an emergency situation" and that any "safety concerns had long since abated").

3. It bears mention that the officers could conceivably offer some justification for their conduct. But no justification is evident from Ms. Sause's complaint. Given the procedural posture of this case, that is dispositive. *See Hernandez*, 137 S. Ct. at 2007–08 (reversing grant of qualified immunity, because circuit court relied on fact not alleged in complaint); *Johnson*, 581 F. App'x at 781 ("Given the procedural posture of Johnson's case . . . the facts surrounding the defendants' justification for their alleged interference with Johnson's religious practices must still be developed."). *See also Tolan*, 134 S. Ct. at 1868 (vacating and remanding "so that the court can determine whether, when [plaintiff's] evidence is properly credited and factual inferences are reasonably drawn in his favor, [defendant's] actions violated clearly established law").

* * *

Any reasonable officer would have known that that forcing a citizen to stop praying in her own home—even if the officer was in the midst of investigating a noise complaint—was unconstitutional absent *some* legitimate law-enforcement purpose. In other words, the officers had "fair notice" that their alleged conduct was unconstitutional and were not entitled to qualified immunity.

Because the Tenth Circuit's decision fundamentally misapprehended this Court's qualified-immunity precedents, the Court should not allow it to stand.

CONCLUSION

The Court should summarily reverse the judgment of the Court of Appeals. In the alternative, the Court should grant the petition for a writ of certiorari, set the case for full merits briefing, and reverse the judgment below.

Respectfully submitted.

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November 17, 2017

APPENDIX

APPENDIX A

United States Court of Appeals
for the Tenth Circuit

No. 16-3231

MARY ANNE SAUSE,

Plaintiff – Appellant,

v.

TIMOTHY J. BAUER, Chief of Police; JASON LINDSEY, Police Officer of Louisburg, Kansas; BRENT BALL, Police Officer of Louisburg, Kansas; RON ANDERSON, Former Chief of Police of Louisburg, Kansas; LEE STEVENS, Former Louisburg, Kansas Police Officer; MARTY SOUTHARD, Mayor of City of Louisburg, Kansas; TRAVIS THOMPSON, Former Mayor of City of Louisburg, Kansas,

Defendants – Appellees.

Appeal from United States District Court
for the District of Kansas
(D.C. No. 2:15-CV-09633-JAR-TJJ)

Bradley G. Hubbard, Gibson, Dunn & Crutcher LLP, Dallas, Texas (James C. Ho, Gibson Dunn & Crutcher LLP, Dallas, Texas, Hiram S. Sasser III, Justin E. Butterfield and Stephanie N. Phillips, First Liberty Institute, Plano, Texas, and Jason Neal, Gibson, Dunn & Crutcher LLP, Washington, D.C., with him on the briefs), for Plaintiff–Appellant.

Christopher B. Nelson, Fisher, Patterson, Sayler & Smith, LLP, Overland Park, Kansas (Michael K. Seck and Amy J. Luck, Fisher, Patterson, Sayler & Smith, LLP, Overland Park, Kansas, on the brief), for Defendants–Appellees.

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **MORITZ**, Circuit Judges.

MORITZ, Circuit Judge.

Mary Anne Sause brought this action under 42 U.S.C. § 1983, alleging that Officers Lee Stevens and Jason Lindsey (the defendants) violated her rights under the First Amendment. The district court dismissed Sause's complaint with prejudice for failure to state a claim, *see* Fed. R. Civ. P. 12(b)(6), and Sause appeals.

Because Sause fails to demonstrate that the contours of the right at issue are clearly established, we agree with the district court that the defendants are entitled to qualified immunity. And we likewise agree that allowing Sause leave to amend her complaint would be futile. Accordingly, we affirm the district court's order to the extent that it dismisses with prejudice Sause's claims for money damages. But because we conclude that Sause lacks standing to assert her claims for injunctive relief, we reverse in part and remand with instructions to dismiss those claims without prejudice.

I

We derive the following facts from Sause's pro se complaint, construing her allegations liberally and in the light most favorable to her. *See Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991) ("A court reviewing the sufficiency of a complaint presumes all of plaintiff's factual allegations are true and construes them in the light most favorable to the plaintiff."); *id.* at 1110 ("A pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers.").

On November 22, 2013, the defendants contacted Sause at her home while investigating a noise complaint. At first, Sause denied the defendants entry "[f]or [her] protection" because she couldn't see through her peephole to determine who was at her door. App. 14. But when the defendants later returned, Sause let them in.

"[A]ppearing angry," the defendants asked Sause why she didn't answer her door the first time. *Id.* at 12. Sause responded by showing them a copy of the Constitution and Bill of Rights that she keeps "on display" by her front door. *Id.* at 13. Lindsey "laugh[ed]" and "mock[ed]" Sause, saying, "[T]hat's nothing, it's just a piece of paper" that "[d]oesn't work here." *Id.* Lindsey also turned on his body camera and told Sause that she was "going to be on" the television show "COPS." *Id.*

At some point, Stevens left Lindsey alone with Sause and her friend Sharon Johnson, who was also present. Lindsey then informed Sause that she "was going to jail," although he "d[idn't] know [why] yet." *Id.* Understandably frightened, Sause asked Lindsey

if she could pray. Lindsey replied, "Yes," and Sause "knelt down on . . . [her] prayer rug." *Id.*

While Sause was still praying, Stevens returned and asked what she was doing. Lindsey laughed and told Stevens "in a mocking tone" that Sause was praying. *Id.* Stevens then ordered Sause to "[g]et up" and "[t]o [s]top praying." *Id.* at 13–14.

Sause's complaint doesn't explicitly state that she complied with Stevens' orders, but it appears she at least stopped praying; when Lindsey told her that she "need[ed] to move back" to Missouri, Sause responded, "Why?" *Id.* at 14. Lindsey then explained to Sause that Sause's apartment manager told him that "no one likes" Sause. *Id.*

Next, the defendants started "looking through [their] booklet" for something to charge Sause with. *Id.* "Lindsey would point" at something in the book, and Stevens "would shake [his] head." *Id.* Eventually, the defendants cited Sause for disorderly conduct and interfering with law enforcement, based at least in part on Sause's failure to answer the door the first time the defendants "came out." *Id.* The defendants then asked to see Sause's tattoos and scars. Sause explained several times that she had previously "had a double mastectomy" and eventually "raised [her] shirt up" and showed the defendants her scars "because they kept asking." *Id.* "That appeared to disgust" the defendants. *Id.* And it "humiliat[ed]" Sause. *Id.*

Two years later, Sause filed suit under § 1983, alleging that the defendants violated her First Amendment rights.[1] The defendants moved to dismiss with prejudice, arguing that Sause's complaint fails to state a claim upon which relief can be granted and that they're entitled to qualified immunity. In response, Sause moved to amend her complaint. Citing a local rule, the district court denied Sause's motion because Sause failed to attach to it a proposed amended complaint. The court explained that it wasn't foreclosing "any future motion to amend that attaches a proposed amended complaint and complies with all applicable [rules]." *Id.* at 62–63.

But when Sause failed to file another motion to amend, the district court granted the defendants' motion to dismiss with prejudice. In doing so, the court reasoned that while Stevens "may have offended" Sause by ordering her to stop praying, he didn't "burden . . . her ability to exercise her religion." *Id.* at 71. Accordingly, the district court concluded that Sause's complaint fails to allege "a plausible First Amendment claim against" Stevens; ruled that Stevens is entitled to qualified immunity; and dismissed Sause's First Amendment claim against him.[2] *Id.* And because the court concluded that granting Sause leave

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[1] Sause also brought other claims and named other defendants. But on appeal, she addresses only her First Amendment claims against Lindsey and Stevens. We therefore confine our analysis to those claims.

[2] The district court didn't separately address whether Lindsey violated Sause's First Amendment rights, apparently because it didn't construe her complaint as asserting such a claim against Lindsey.

to amend would be futile, it dismissed Sause's complaint with prejudice. Sause appeals.

II

Sause advances three general arguments on appeal. First, she argues that the defendants aren't entitled to qualified immunity because they violated her clearly established rights under the First Amendment. Second, she argues that even assuming the defendants are entitled to qualified immunity because the contours of that right aren't clearly established, the doctrine of qualified immunity doesn't shield them from her claims for injunctive relief. Third, Sause argues that even if dismissal under Rule 12(b)(6) was appropriate, the district court should have dismissed her complaint without prejudice and given her leave to amend.

A

We review de novo the district court's decision to dismiss Sause's claims on the basis of qualified immunity. *Columbian Fin. Corp. v. Stork*, 811 F.3d 390, 396 (10th Cir. 2016). To defeat the defendants' assertion of qualified immunity at the motion-to-dismiss stage, Sause "must allege sufficient facts that show—when taken as true—the defendant[s] plausibly violated h[er] constitutional rights, which were clearly established at the time of violation." *Schwartz v. Booker*, 702 F.3d 573, 579 (10th Cir. 2012).

We assume that Sause can satisfy the first prong of this inquiry. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (explaining that we have discretion to address second prong first "in light of the circumstances in the particular case at hand"). That is, we assume that the defendants violated Sause's rights under the

First Amendment when, according to Sause, they repeatedly mocked her, ordered her to stop praying so they could harass her, threatened her with arrest and public humiliation, insisted that she show them the scars from her double mastectomy, and then "appeared . . . disgust[ed]" when she complied—"all over" a mere noise complaint. App. 14, 17.

But this assumption doesn't entitle Sause to relief. Instead, Sause must demonstrate that any reasonable officer would have known this behavior violated the First Amendment. *See Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011) (explaining that right isn't clearly established unless every reasonable officer would know that conduct at issue violates that right). Sause argues she can make this showing because it was clearly established that she had a "right to pray in the privacy of [her] home free from governmental interference," at least in the absence of "any legitimate law enforcement interest." Aplt. Br. 15, 47. Alternatively, she asserts, "[t]he right to be free from official retaliation for exercising one's First Amendment rights [was] also clearly established." *Id.* at 48.

We don't disagree with Sause's articulation of these general rights. But the Supreme Court has repeatedly and consistently warned us "not to define clearly established law at [this] high level of generality." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al–Kidd*, 563 U.S. at 742). Instead, "[t]he dispositive question is 'whether the violative nature of [the defendants'] *particular conduct* is clearly established.'" *Id.* (quoting *al–Kidd*, 563 U.S. at 742). In other words, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Anderson v.*

Creighton, 483 U.S. 635, 640 (1987)); *see id.* (suggesting that law isn't clearly established unless court can "identify a case where an officer acting under similar circumstances as [defendant] was held to have violated" relevant constitutional right). Thus, before we may declare the law to be clearly established, we generally require (1) "a Supreme Court or Tenth Circuit decision on point," or (2) a showing that "the clearly established weight of authority from other courts [has] found the law to be as the plaintiff maintains." *Fancher v. Barrientos*, 723 F.3d 1191, 1201 (10th Cir. 2013) (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007)).

Here, Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here—i.e., a scenario in which (1) officers involved in a legitimate investigation obtain consent to enter a private residence and (2) while there, ultimately cite an individual for violating the law but (3) in the interim, interrupt their investigation to order the individual to stop engaging in religiously-motivated conduct so that they can (4) briefly harass her before (5) issuing a citation. In other words, "this case presents a unique set of facts and circumstances." *White*, 137 S. Ct. at 552 (quoting *Pauly v. White*, 814 F.3d 1060, 1077 (10th Cir. 2016), *cert. granted and judgment vacated*, 137 S. Ct. 548 (2017)). And "[t]his alone" provides "an important indication . . . that [the defendants'] conduct did not violate a 'clearly established' right." *Id.*

Of course, the Supreme Court has said that "'general statements of the law are not inherently incapable of giving fair and clear warning' to officers." *White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). And we recognize that Sause need not identify "a case *directly* on point" to show that the law is clearly established. *al-Kidd*, 563 U.S. at 741 (emphasis added). "After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015).

But while the conduct alleged in this case may be obviously unprofessional, we can't say that it's "obviously unlawful." *Id.* It certainly wouldn't be obvious to a reasonable officer that, in the midst of a legitimate investigation, the First Amendment would prohibit him or her from ordering the subject of that investigation to stand up and direct his or her attention to the officer—even if the subject of the investigation is involved in religiously-motivated conduct at the time, and even if what the officers say or do immediately after issuing that command does nothing to further their investigation.

In other words, this isn't a case where the defendants' conduct is so "obviously egregious . . . in light of prevailing constitutional principles" that "less specificity is required from prior case law to clearly establish the violation." *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008) (quoting *Casey*, 509 F.3d at

1284).[3] Instead, Sause can only satisfy the clearly-established prong by citing a case or cases that make clear "the violative nature of [the defendants'] *particular* conduct." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742). And because Sause fails to identify—and our independent research fails to yield—any such authority, we conclude that the law isn't clearly established. Accordingly, we agree with the district court that Stevens is entitled to qualified immunity.[4]

Our conclusion that Stevens is entitled to qualified immunity also resolves Sause's next argument: that the district court erred in construing her complaint to allege a First Amendment claim against Stevens alone, rather than alleging claims against both Stevens and Lindsey. Even if we assume that Sause's complaint alleges a First Amendment claim against Lindsey, the district court's failure to recognize as much was harmless. In the absence of any authority that "place[s] the . . . constitutional question beyond debate," Lindsey is, like Stevens, entitled to qualified immunity. *al-Kidd*, 563 U.S. at 741.

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[3] We have recently questioned *Casey*'s "sliding-scale approach." *Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016). But we need not address its continuing validity here; even assuming it survives the Court's decision in *Mullenix*, 136 S. Ct. 305, it doesn't help Sause.

[4] The district court didn't reach the clearly-established prong because it found there was no constitutional violation. But we "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011).

B

Alternatively, Sause argues that even if she fails to satisfy the clearly-established prong and the defendants are therefore entitled to qualified immunity, the district court nevertheless erred in dismissing her complaint because it asserts plausible claims for injunctive relief. *See Jones v. City & Cty. of Denver*, 854 F.2d 1206, 1208 n.2 (10th Cir. 1988) (explaining that because doctrine of qualified immunity doesn't protect officials from claims for injunctive relief, "defendants must proceed to trial" on such claims, "even if qualified immunity protects them from suit on the question of liability for money damages").

For purposes of this argument, we again assume that Sause's complaint adequately pleads a constitutional violation. And we agree with Sause that her pro se complaint demonstrates an intent to seek injunctive relief for that violation. Specifically, Sause asserts that "[n]o money" can adequately compensate her for the alleged violation of her constitutional rights. App. 16. Moreover, Sause's complaint indicates that "the wrongs alleged . . . are continuing to occur at the present time." *Id.* Finally, Sause asserts that Lindsey "[t]hreatened [her] again" sometime in March 2015 and "[l]ectured" her that "'[f]reedom of [s]peech' means nothing." *Id.* at 17.

But while these allegations are sufficient to establish that Sause is attempting to assert claims for injunctive relief, they're insufficient to establish that

she has standing to maintain such claims.[5] That's because a plaintiff lacks standing to "maintain a declaratory or injunctive action unless he or she can demonstrate a good chance of being likewise injured in the future." *Barney v. Pulsipher*, 143 F.3d 1299, 1306 n.3 (10th Cir. 1998) (quoting *Facio v. Jones*, 929 F.2d 541, 544 (10th Cir. 1991)); *see City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) ("[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . ." (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495 (1974))).

In *Lyons*, the plaintiff "filed a complaint for damages, injunction, and declaratory relief" based on law enforcement's use, during a routine traffic stop, of a chokehold that left him unconscious and damaged his larynx. 461 U.S. at 97–98. The Supreme Court agreed that these allegations were sufficient to demonstrate that the plaintiff "may have been illegally choked by the police" on a single occasion, and thus "presumably [had] standing to claim damages." *Id.* at 105.

But the Court said that those same allegations "d[id] nothing to establish a real and immediate threat" that the plaintiff would again suffer a similar injury in the near future—i.e., "that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally

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[5] Although the district court didn't address Sause's standing to seek injunctive relief and the defendants don't challenge her standing to do so on appeal, we have an independent obligation to address the issue. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1126 (10th Cir. 2013) ("[W]henever standing is unclear, [this court] must consider it *sua sponte* to ensure there is an Article III case or controversy before [it].").

choke him into unconsciousness without any provocation or resistance on his part." *Id.* And because there was no indication that the plaintiff "faced a real and immediate threat of again being illegally choked," the Court reasoned, the plaintiff "failed to demonstrate a case or controversy . . . that would justify the equitable relief sought." *Id.* at 105, 110. Accordingly, the Court concluded, "the [d]istrict [c]ourt was quite right in dismissing" the plaintiff's claim for injunctive relief. *Id.* at 98, 110.

So too here, where Sause indicates in her complaint only that "the wrongs alleged" there "continu[e] to occur." App. 16. This general allegation is "vague and completely lacking in specificity," *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1188 (10th Cir. 2003) (quoting *Ledbetter v. City of Topeka*, No. 00-1153-DES, 2001 WL 80060, at *2 (D. Kan. Jan. 23, 2001), *aff'd*, 318 F.3d 1183 (10th Cir. 2003)))—especially in light of the numerous and varied "wrongs" Sause alleges in her 14-page complaint, App. 16.

The only specific allegations Sause makes to that effect are her assertions that Lindsey "[t]hreatened [her] again" sometime in March 2015 and "[l]ectured" her that "'[f]reedom of [s]peech' means nothing." App. 15–17. These allegations are insufficient to demonstrate that Sause faces "a good chance of being likewise injured in the future." *Barney*, 143 F.3d at 1306 n.3 (quoting *Facio*, 929 F.2d at 544). That is, Sause fails to establish she "face[s] a real and immediate threat" that (1) the defendants will again enter her home while investigating a crime; (2) she will again kneel and pray; and (3) the defendants will again order her to stand up and stop praying so they can harass her. *Lyons*, 461 U.S. at 105; *see Barney*, 143 F.3d

at 1306 & n.3 (holding that plaintiffs lacked standing to seek injunctive relief because they failed to demonstrate any likelihood that they would "end up" back in jail where alleged constitutional violations occurred).

True, Sause's complaint indicates she continues to "fear[] [t]o [t]his [d]ay" that she will have a similar encounter with the defendants sometime in the future. App. 17. But it's "the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions." *Lyons*, 461 U.S. at 107 n.8. Thus, "[t]he emotional consequences" of the acts Sause alleges in her complaint "simply are not a sufficient basis for an injunction absent a real and immediate threat of future injury by the defendant[s]." *Id.* Accordingly, Sause's subjective fears, however genuine, are insufficient to establish standing.

In short, we agree with Sause that qualified immunity doesn't shield the defendants against her claims for injunctive relief. But because Sause lacks standing to maintain those claims, the district court was "quite right" to dismiss them. *Lyons*, 461 U.S. at 110. Nevertheless, Sause's lack of standing deprived the district court of subject matter jurisdiction to reach the merits of her claims for injunctive relief. Accordingly, we remand to the district court with directions to dismiss those claims without prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1218 (10th Cir. 2006).

C

Finally, even assuming dismissal was appropriate, Sause argues that the district court abused its discretion in concluding that it would be futile to grant

Sause leave to amend and in dismissing Sause's claims with prejudice on that basis. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010) ("[O]rdinarily the dismissal of a pro se claim under Rule 12(b)(6) should be without prejudice, and a careful judge will explain the pleading's deficiencies so that a prisoner with a meritorious claim can then submit an adequate complaint." (internal citations omitted)).

In support of this argument, Sause asserts that her "complaint states a plausible claim," Aplt. Br. 53, or at the very least, that her "factual allegations are close to stating" one, *id.* at 53–54 (quoting *Gee*, 627 F.3d at 1195).

We don't necessarily disagree. Indeed, for purposes of resolving this appeal, we assume that the defendants violated Sause's First Amendment rights. But even with the benefit of that assumption, the defendants are nevertheless entitled to qualified immunity because Sause fails to identify a case that "place[s] the . . . constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. And because Sause makes no effort to explain how she might amend her complaint to overcome this legal hurdle, she fails to demonstrate that the district court abused its discretion in dismissing her claims for monetary relief with prejudice. *Cf. Gee*, 627 F.3d at 1195 (affirming dismissal with prejudice where claims were "barred by preclusion or the statute of limitations" because "amending those claims would be futile").

* * *

To the extent that Sause's complaint seeks monetary relief, we agree that the defendants are entitled

to qualified immunity and that providing Sause an opportunity to amend her complaint would be futile. Accordingly, we affirm the district court's order to the extent that it dismisses with prejudice Sause's claims for money damages. To the extent that Sause's complaint instead seeks injunctive relief, we likewise conclude that the district court properly dismissed her claims. But because we conclude that Sause's lack of standing deprived the district court of subject matter jurisdiction, we remand with directions to dismiss her claims for injunctive relief without prejudice.

TYMKOVICH, C.J., concurring.

I fully join in Judge Moritz's opinion and agree that the officers' conduct here did not violate clearly established First Amendment precedent. I write separately to emphasize that Ms. Sause's allegations fit more neatly in the Fourth Amendment context. And, I must add, either the officers here acted with extraordinary contempt of a law abiding citizen and they should be condemned, or, if Ms. Sause's allegations are untrue, she has done the officers a grave injustice by manufacturing such reprehensible conduct.

It is axiomatic that an initially justified police encounter may nonetheless evolve into an unconstitutional seizure if, for example, the encounter is prolonged beyond the time reasonably required to complete the legitimate police objective justifying the encounter, or if the officers' actions are not reasonably related in scope to that legitimate objective.[1] If we believe Ms. Sause's allegations, this sort of devolution is what happened here.

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[1] *See, e.g.*, *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) ("It is [] clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt Cty.*, 542 U.S. 177, 185 (2004) ("To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be 'justified at its inception and reasonably related in scope to the circumstances which justified the interference in the first place.'" (citation omitted; alteration incorporated)). *See also, e.g.*, *United States v. Tubens*, 765 F.3d 1251, 1254 (10th Cir.

The parties agree that Officers Lindsey and Stevens arrived at Ms. Sause's home while investigating a noise complaint. But although the officers' initial motives may have been legitimate, Ms. Sause's complaint indicates the situation quickly devolved. According to the complaint, the officers were more preoccupied with harassing Ms. Sause than with conducting a legitimate police investigation. For example, while the complaint does not allege that the officers questioned Sause about the alleged noise complaint or their attendant investigation, Ms. Sause does allege that the officers:

(1) told her the Constitution and Bill of Rights were "nothing, [] just a piece of paper" that "[d]oesn't work here," App. 13;

(2) threatened that their encounter was "going to be on 'COPs'" (a television show), *id.*;

(3) told her to "get ready" because she was "going to jail," and, although they did not yet know why she would be going to jail, that her bond would be $2,000, *id.*;

(4) demanded that she "[g]et up" and "[s]top praying" only to tell her that she "need[ed] to move from

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2014) ("[E]ven assuming, as the district court did, that the officers' investigation of Tubens escalated from a consensual encounter, . . . the officers' investigation [must be] both 'justified at its inception' and 'reasonably related in scope to the circumstances which justified the interference in the first place.'" (citations omitted)); *United States v. De La Cruz*, 703 F.3d 1193, 1197 (10th Cir. 2013) (acknowledging that there may come a point during a police encounter at which any initial justification has "vanished" and, beyond that point, "[e]ven a very brief extension of the detention without consent or reasonable suspicion violates the Fourth Amendment" (citation omitted)).

here," "to move back where [she] came from . . . because no one like[d] [her] here," *id.* at 14;

(5) flipped through a booklet, seemingly searching for a violation with which to charge Ms. Sause, *see id.*, suggesting they were not going to proceed with charges for any alleged noise violation;

(6) issued Ms. Sause tickets for "Interference with Law Enforcement" and "Disorderly Conduct," allegedly for not answering her door when the officers first approached, *id.*; and

(7) repeatedly (*i.e.*, three or four times) asked Ms. Sause to show them any tattoos or scars she had, including scars on her chest from a double mastectomy, *id.*

If true, Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose capable of justifying a continuing police intrusion in her home. The officers deny the alleged conduct, although we assume for purposes of a motion to dismiss that the allegations are true. And we do not know whether the district court would find a constitutional violation in these circumstances or, if so, whether any violation would be clearly established.

But Ms. Sause did not make a Fourth Amendment claim on appeal and has only appealed the First Amendment cause of action. I agree First Amendment law is not clearly established for the reasons articulated by Judge Moritz in her well-written opinion.

APPENDIX B

In The United States District Court
For The District of Kansas

No. 15-CV-9633-JAR-TJJ

MARY ANNE SAUSE,

Plaintiff,

v.

LOUISBURG POLICE DEPT., CHIEF OF POLICE TIMOTHY J. BAUER, ET AL.,

Defendant.

Memorandum and Order

Plaintiff Mary Anne Sause, proceeding *pro se*, filed this civil action against the Louisburg, Kansas, Police Department, Louisburg Chief of Police Timothy Bauer, Louisburg Police Officers Jason Lindsey and Brent Ball, former Louisburg Chief of Police Ron Anderson, former Louisburg Police Officer Stevans, current Louisburg Mayor Marty Southard, and former Louisburg Mayor Travis Thompson. Plaintiff seeks compensatory and punitive damages and injunctive relief under 42 U.S.C. § 1983 for alleged violations of the First and Fourth Amendments to the U.S. Constitution and the Americans with Disabilities Act of 1990 ("ADA").

Specifically, Plaintiff contends that Officer Ball, former Chief Anderson, and Chief Bauer failed to investigate or follow up on alleged assaults by Plaintiff's neighbors and complaints she made about other police

officers. Plaintiff alleges that she was the victim of assaults by several residents of her apartment complex. Plaintiff claims that charges as to these assaults are "missing," and Plaintiff was given no protection after several requests for an internal investigation. Plaintiff further alleges that when Officers Stevans and Lindsey responded to a noise complaint at her apartment, Officer Stevans prohibited her from praying in violation of the First Amendment, and Officer Lindsey prevented her from entering her bedroom in violation of the Fourth Amendment. Plaintiff alleges the officers intimidated her and threatened to charge her with crimes, and Plaintiff claims that she fears for her safety.

Defendants moved the Court to dismiss Plaintiff's Complaint (Doc. 18) pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim because Defendants are entitled to qualified immunity and because the Louisburg, Kansas, Police Department is not an entity subject to suit. For the reasons explained below, the Court grants Defendants' Motion to Dismiss.

I. Factual Background

Unless otherwise stated, the following facts are drawn from Plaintiff's Complaint and construed in the light most favorable to Plaintiff.[1] While investigating a noise complaint at Plaintiff's apartment building on November 22, 2013, Officers Lindsey and Stevans arrived at Plaintiff's front door and became angry when Plaintiff did not immediately answer or allow them entry. The officers left and returned, asking Plaintiff why she would not let them in. Plaintiff answered the

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[1] *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007).

door and picked up a Constitution booklet and copy of the Bill of Rights, which she keeps near her front door. Officer Lindsey mockingly told Plaintiff, "[T]hat's nothing, it's just a piece of paper. Doesn't work here."[2] Officer Stevans did not stop him from making these comments, and Stevans left the apartment shortly after.

Officer Lindsey then allegedly put on a body camera before he entered Plaintiff's apartment and threatened that Plaintiff would be on the TV show "Cops." Plaintiff's friend was in the apartment with her, and she went to Plaintiff's bedroom to put Plaintiff's dog in its kennel. Officer Lindsey went into the bedroom as well. Officer Lindsey refused to let Plaintiff enter her bedroom, and she heard him talking to her friend in a threatening, angry voice. He told Plaintiff to get ready because she was going to jail. When Plaintiff asked why, Officer Lindsey told her he did not know yet, but the bond would be $2,000.

Plaintiff allegedly asked Officer Lindsey if she could pray, and upon his approval, knelt on her prayer rug. Officer Stevans reappeared at Plaintiff's apartment while she was praying and mockingly told her to get up and stop praying. Officer Lindsey then told Plaintiff she needed to move from her apartment because no one likes her there. Plaintiff responded that she was on disability and lived in government-subsidized housing, so she did not have money to move.

The officers cited Plaintiff for disorderly conduct and interfering with law enforcement for refusing to

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[2] Doc. 1 at 7.

open her door when they first knocked, despite Plaintiff's explanation that she could not see out of the peep hole and she did not answer her door for her protection.

Plaintiff also claims the officers asked her to show them her scars and tattoos. After being asked three or four times, Plaintiff allegedly lifted her shirt to show them that she had a double mastectomy.

Plaintiff states that Officer Lindsey has been threatening her since March 2015. Plaintiff has allegedly been requesting an internal investigation with former Chief Anderson since March 2015 and current Chief Bauer since September 21, 2015. Plaintiff claims she met with Chief Anderson in his office in 2015.

Plaintiff claims that on September 21, 2015, she met with Chief Bauer at his office to discuss her request for an internal investigation. She allegedly told Chief Bauer that Officer Lindsey's abuse had gone on long enough and she feels unsafe. She alleges that Chief Bauer dismissively responded that he had 4,300 other citizens to deal with. Plaintiff claims that on October 8, 2015, she gave Chief Bauer a notarized letter at a public forum; Chief Bauer allegedly shook Plaintiff's hand and told her he would have an answer to her questions within five days, but he never followed through.

Plaintiff alleges that she has been assaulted by residents of her apartment building but charges are "missing." She claims she wanted to report these assaults to another police officer, but Officer Ball threatened to give her a citation for disorderly conduct to

prevent her from reporting the assaults. Plaintiff allegedly reported this incident but is "missing [a] report and witness statements." Plaintiff states that former Chief Anderson was aware of the incident with Officer Ball. She also claims that Mayor Southard and former Mayor Thompson were aware of her complaints about the police officers. She alleges that the mayors employ or employed the police officer defendants.

II. Discussion

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[3] It must provide sufficient factual allegations to "give the defendant fair notice" of the grounds for the claim against them.[4] To survive a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6), a complaint must include "enough facts to state a claim to relief that is plausible on its face," rather than just conceivable, and "raises a right to relief above the speculative level."[5] Under the plausibility standard, if allegations "are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs 'have not nudged their claims across the line from conceivable to plausible.'"[6] The plausibility standard does not require a showing of probability that a defendant has acted unlawfully, but requires

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[3] Fed. R. Civ. P. 8(a)(2).

[4] *Twombly*, 550 U.S. at 555.

[5] *Id.* at 570, 555.

[6] *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570).

"more than a sheer possibility."[7] As the Supreme Court has explained, "[a] pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[8] All of the plaintiff's factual allegations are presumed true and construed in a light most favorable to the plaintiff.[9] There might be "greater bite" and "greater likelihood of failures in notice and plausibility" in § 1983 cases against individual government actors because complaints generally include complex claims against several defendants.[10]

Because Plaintiff is a *pro se* litigant, the Court construes her pleadings liberally and holds them to a less stringent standard than those drafted by lawyers.[11] However, the Court may "not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf."[12]

A. Qualified Immunity

Defendants argue that Plaintiff's Complaint should be dismissed because Officers Lindsey, Ball,

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[7] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

[8] *Id.* (quoting *Twombly*, 550 U.S. at 555, 557).

[9] *Hall v. Bellmon*, 935 F.2d 1106, 1109 (10th Cir. 1991) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

[10] *Robbins*, 519 F.3d at 1249.

[11] *Whitney v. New Mexico*, 113 F.3d 1170, 1173 (10th Cir. 1997) (citing *Gagan v. Norton*, 35 F.3d 1473, 1474 (10th Cir. 1994)).

[12] *Id.* at 1173–74 (citing *Hall*, 935 F.2d at 1110).

and Stevans, as well as Chief Bauer and former Chief Anderson, are entitled to qualified immunity. Under the doctrine of qualified immunity, government officials who perform discretionary functions are shielded from individual liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known."[13] The doctrine is not just a defense to liability, but rather provides immunity from lawsuits altogether.[14] Accordingly, the qualified immunity defense must be resolved "at the earliest possible stage of litigation."[15] "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'"[16] Because qualified immunity is the "norm" in private actions against public officials, there is a presumption of immunity when the defense is raised.[17] When a defendant claims qualified immunity, the plaintiff bears a heavy burden of showing (1) the defendant's violation of a constitutional or statutory right; and (2) that the "infringed right at issue was clearly established at the time of the allegedly unlawful activity such that a reasonable [official] would have known that his or her

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[13] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

[14] *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

[15] *Robbins*, 519 F.3d at 1249 (quoting *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987)).

[16] *Stanton v.* Sims, 134 S. Ct. 3, 5 (2013) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

[17] *Pahls v. Thomas*, 718 F.3d 1210, 1227 (10th Cir. 2013) (citing *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010)).

challenged conduct was illegal."[18] For the court to resolve the issue of qualified immunity at the earliest possible stage of litigation, a plaintiff's complaint must allege enough facts to make clear the grounds on which his or her claims rest.[19]

A government official may be personally liable under § 1983 if a plaintiff shows that the officer, acting under color of state law, deprived the plaintiff of his or her federal rights.[20] To demonstrate that a clearly established right has been infringed, a plaintiff may direct the court "to cases from the Supreme Court, the Tenth Circuit, or the weight of authority from other circuits."[21] At the same time, an action can violate a clearly established right even if there is no specific case addressing that exact action.[22] The unlawfulness of the action at issue must be apparent even if that action has not specifically been held to be unlawful.[23] The question of whether a right is clearly established must be answered "in light of the specific context of the case, not as a broad general proposition."[24] The

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[18] *Martinez v. Carr*, 479 F.3d 1292, 1294–95 (10th Cir. 2007).

[19] *See Robbins*, 519 F.3d at 1249 (citing *Twombly*, 550 U.S. at 598 n.2).

[20] *Ward v. Lenexa, Kan. Police Dep't*, No. 12-2642-KHV, 2014 WL 1775612, at *5 (D. Kan. May 5, 2014).

[21] *Anderson v. Blake*, 469 F.3d 910, 914 (10th Cir. 2006).

[22] *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

[23] *Id.*

[24] *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

plaintiff must be able to "demonstrate that 'every reasonable official would have understood'" that his or her actions violated the law.[25]

1. Claims against Defendants Ball, Anderson, and Bauer

Plaintiff's claim against Defendant Ball rests on her allegation that he did not properly investigate her assault complaint. Her claims against Defendants Anderson and Bauer are based on her contention that they refused to investigate her complaints about other officers. Generally, citizens do not have a constitutional or statutory right to compel a state to investigate grievances or crimes against them.[26] The state may not discriminate in the way it protects its citizens, but there is no constitutional right to police protection.[27] Because failing to investigate or follow up on Plaintiff's complaints did not violate any clearly established constitutional or federal rights, Defendants Ball, Anderson, and Bauer are entitled to qualified immunity. Accordingly, Plaintiff's claims against those officers are dismissed.

2. Claim Against Defendant Stevans

Plaintiff claims that Officer Stevans violated her First Amendment rights by telling her to stop praying.

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[25] *Wilson v. City of Lafayette*, 510 F. App'x 775, 777 (10th Cir. 2013) (quoting *al-Kidd*, 563 U.S. at 741).

[26] *See DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989); *see also Griego v. City of Albuquerque*, 100 F. Supp. 3d 1192, 1225 (D.N.M. 2015).

[27] *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114 (10th Cir. 2008).

The Court construes Plaintiff's First Amendment claim as alleging a violation of the Free Exercise Clause. The Free Exercise Clause of the First Amendment "protects the right of every person to choose a religion to practice without state compulsion."[28] To establish a Free Exercise claim, a plaintiff must allege facts that, if true, would illustrate that the challenged government action created a burden on the exercise of religion.[29] The exercise of religion is burdened when the challenged government action is coercive or compulsory.[30] A plaintiff "must allege facts showing she was coerced into [conduct] contrary to her religious beliefs."[31]

Plaintiff's Complaint does not state a plausible First Amendment claim against Officer Stevans. Officers Stevans and Lindsey were investigating a noise complaint in Plaintiff's building, which led them to her apartment. While Officer Stevans's instruction to Plaintiff to stop praying may have offended her, it does not constitute a burden on her ability to exercise her religion. Plaintiff fails to provide any allegations that would suggest Officer Stevans's actions coerced her into conduct contrary to her religious beliefs, or that he otherwise prevented her from practicing her religion. Rather, he merely instructed her to stop

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[28] *Martin v. City of Wichita*, No. 98-4145-RDR, 1999 WL 1000501, at *4 (D. Kan. Oct. 27, 1999).

[29] *Fields v. City of Tulsa*, 753 F.3d 1000, 1009 (10th Cir. 2014).

[30] *Id.*

[31] *Bauchman v. W. High Sch.*, 132 F.3d 542, 557 (10th Cir. 1997) (internal quotation marks omitted).

praying while the officers were in the middle of talking to her about a noise complaint they had received. The Court thus finds that Plaintiff has not made a plausible claim that her First Amendment rights were violated. Because Plaintiff has not established that Officer Stevans violated her clearly established rights, the Court finds that he is entitled to qualified immunity and the claim against him is dismissed.

3. Claims Against Defendant Lindsey

a. Fourth Amendment

Plaintiff alleges that Officer Lindsey violated her Fourth Amendment rights by refusing to let her enter her bedroom while he was in her apartment. That claim is not sufficient to establish a Fourth Amendment violation. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[32] Plaintiff's Complaint indicates that she permitted the officers to enter her apartment. She does not allege that either of the officers searched her apartment or her person. The officer's alleged refusal to allow Plaintiff to enter her bedroom while she was being questioned by the officers does not constitute a violation of her Fourth Amendment rights. Plaintiff has thus failed to show that Officer Lindsey violated a clearly established right; the Court finds that he is entitled to qualified immunity and Plaintiff's Fourth Amendment claim is dismissed.

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[32] *Herring v. United States*, 555 U.S. 135, 139 (2009).

b. ADA Claim

Finally, to the extent Plaintiff alleges that Officer Lindsey discriminated against her because of her disability when he allegedly told her she should move out of her apartment, that claim is also dismissed. The ADA forbids discrimination "on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation."[33] Officer Lindsey's comment to Plaintiff does not constitute discrimination. Plaintiff herself made a connection between his comment and her alleged disability by responding to Officer Lindsey that she could not afford to leave her apartment because she is disabled. She does not allege facts to show that the officer had any ability or intention to force her to move from her apartment. He merely made a mean comment that Plaintiff's neighbors did not like her and she should move away. The Complaint does not adequately allege that his comment had anything to do with Plaintiff's disability[34] and does not constitute discrimination within the meaning set forth in the ADA. Plaintiff has therefore failed to allege that Officer Lindsey violated any clearly established rights, and her claim is dismissed.

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[33] 42 U.S.C. § 12182(a) (1990).

[34] And in fact, Plaintiff does not allege facts in her Complaint that show she is disabled within the meaning of the ADA; she merely states in a conclusory fashion that she is disabled.

4. Claims Against Defendants Southard and Thompson

Plaintiff's claims against Defendants Southard and Thompson, the current and former mayors of Louisburg, also warrant dismissal. She alleges that they employed the defendant police officers, and apparently seeks to hold them accountable for the officers' alleged actions. As the Court has already shown, Plaintiff fails to plausibly allege that any of the defendants has violated her rights. Even if the police officer defendants had committed violations of her rights, however, courts generally do not hold government officials liable for violations committed by employees.[35] Rather, the municipality itself might be held liable if a plaintiff is able to show that the actions were the result of an official government policy.[36] This standard implicitly recognizes that police officers are generally employed by a municipality itself, not by individual mayors or government officials. Plaintiff does not allege any facts that would support a claim of municipal liability, nor does she make any specific allegations of wrongdoing by Defendants Southard and Thompson. The claims against them are therefore dismissed.

B. The Louisburg, Kansas Police Department is Not an Entity Subject to Suit

The Court also finds that Plaintiff's claim against the Louisburg, Kansas Police Department must be

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[35] *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 663–64 (1978).

[36] *Id.* at 694.

dismissed because it is not a legal entity capable of being sued. Under Kansas law, agencies of a city do not have the capacity to sue or be sued unless a statute or ordinance expressly gives such authority.[37] Plaintiff has not pointed the Court to such a statute or ordinance. And "[t]his Court has routinely dismissed actions against city police departments because they are not entities capable of being sued."[38] Accordingly, Plaintiff's claim against the Louisburg, Kansas Police Department is dismissed for Plaintiff's failure to state a claim for which relief can be granted.

C. Leave to Amend

"[A] *pro se* litigant bringing suit *in forma pauperis* is entitled to notice and an opportunity to amend the complaint to overcome any deficiency unless it is clear that no amendment can cure the defect."[39] Leave need not be granted if amendment would be futile.[40] However, if the *pro se* plaintiff's factual allegations are close to stating a claim but are missing some important element, the Court should allow him leave to amend.[41]

As described above, to the extent Plaintiff's factual allegations are discernable, they are far from

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[37] *Hopkins v. State*, 702 P.2d 311, 316 (Kan. 1985); *Whayne v. Kansas*, 980 F. Supp. 387, 392 (D. Kan. 1997).

[38] *Ward v. Lenexa, Kan. Police Dep't*, No. 12-2642-KHV, 2014 WL 1775612, at *4 (D. Kan. May 5, 2014).

[39] *Denton v. Hernandez*, 504 U.S. 25, 34 (1992).

[40] *See Gee v. Pacheco*, 627 F.3d 1178, 1195 (10th Cir. 2010).

[41] *Id.* (citing *Hall*, 935 F.2d at 1110).

stating a plausible claim. Plaintiff's response to Defendants' Motion to Dismiss merely restates the same allegations she makes in her Complaint. She contends that she will be able to prove all of her factual allegations through discovery. However, the purpose of qualified immunity is to shield government officials from liability as well as the process of discovery. Allowing discovery to proceed with the hope that Plaintiff will be able to prove her allegations is contrary to the purpose of the qualified immunity doctrine, especially where Plaintiff's allegations are far from stating plausible claims. Accordingly, the Court finds that leave to amend would be futile.

IT IS THEREFORE ORDERED BY THE COURT that Defendants' Motion to Dismiss (Doc. 18) is **granted**.

IT IS SO ORDERED.

Dated: June 17, 2016

S/ Julie A. Robinson
JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals
for the Tenth Circuit

No. 16-3231
(D.C. No. 2:15-CV-9633-JAR-TJJ)
(D. Kan.)

MARY ANNE SAUSE,

Plaintiff – Appellant,

v.

TIMOTHY J. BAUER, Chief of Police; JASON LINDSEY, Police Officer of Louisburg, Kansas; BRENT BALL, Police Officer of Louisburg, Kansas; RON ANDERSON, Former Chief of Police of Louisburg, Kansas; LEE STEVENS, Former Louisburg, Kansas Police Officer; MARTY SOUTHARD, Mayor of City of Louisburg, Kansas; TRAVIS THOMPSON, Former Mayor of City of Louisburg, Kansas,

Defendants – Appellees.

JUDGMENT

Before **TYMKOVICH**, Chief Judge, **LUCERO** and **MORITZ**, Circuit Judges.

This case originated in the United District Court for the District of Kansas and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court
ELISABETH A. SHUMAKER, Clerk

No. 17-742

IN THE

Supreme Court of the United States

MARY ANNE SAUSE,

Petitioner,

v.

TIMOTHY J. BAUER, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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Question Presented

Officers were investigating a noise complaint in the home of Petitioner Mary Anne Sause. Over 20 minutes into the encounter, Sause asked Officer Lindsey to pray; Lindsey said yes and Sause knelt and began praying. Officer Stevens entered the room and, after a time, told Sause get up and to stop praying. Sause did so. The officers gave Sause two citations for interference and disorderly conduct.

The question presented is:

Whether the Court of Appeals correctly held Respondents were entitled to qualified immunity because the law was not so clearly defined at the time of the incident that it would be clear to every reasonable law enforcement officer that they would violate the First Amendment by instructing the subject of an investigatory detention to stop praying while the investigation was ongoing.

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A. The question presented in the Petition ignores the facts alleged in Sause's complaint and the premise to the question presented is not supported by the record. 6

B. An instruction to "stop praying" during a legitimate investigatory detention does not violate any clearly established constitutional right of which all reasonable officials would have known. The Tenth Circuit correctly held that, even assuming such conduct violates the First Amendment, the law is not clearly established. 8

1. Petitioner concedes there is no caselaw involving sufficiently similar circumstances that squarely governs here. 9

2. The decision below is wholly consistent with *Hope v. Pelzer*. The Tenth Circuit did not require a case directly on point; rather, the court correctly held existing precedent does not place the constitutional right claimed by the Petitioner beyond debate. 12

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Introduction

Respondents, Officers Jason Lindsey and Lee Stevens ("the Officers"), responded to a noise complaint involving Petitioner Mary Anne Sause and her radio. Sause initially refused to answer the door when the officers knocked. When the officers returned a second time, Sause answered the door and presented a booklet with the Constitution and Bill of Rights. Over 20 minutes into the encounter, when Officer Stevens had left the home for a time, Sause asked Officer Lindsey to pray; Lindsey said yes and Sause knelt and began praying. Officer Stevens returned and, after a time, told Sause get up and to stop praying. Sause did so. Sause was thereafter given tickets for interference with law enforcement and disorderly conduct (the validity of which she does not challenge).

Sause sued Officers Lindsey and Stevens under 42 U.S.C. § 1983, alleging they violated her rights under the First Amendment. The district court granted the Officers' motion to dismiss for failure to state a claim because the instruction to Sause to stop praying did not violate her rights under the First Amendment. The Court of Appeals for the Tenth Circuit affirmed, but on different grounds. The Tenth Circuit assumed, without deciding, that the Officers' conduct violated Sause's rights under the First Amendment. The Court of Appeals held the Officers were nonetheless entitled to qualified immunity because the law was not clearly established that their alleged conduct violated the law.

The Tenth Circuit's decision is correct—even accepting Sause's allegations of interspersed harassment as true. Even if we were to assume the Officer's

conduct—telling Sause to stop praying while they conducted their investigation into the noise complaint—violated the constitution, the law was not "clearly established" at the time of the events in November 2013.

Petitioner asks this Court for an advisory opinion stating what the law would be if the circumstances were different than those presented by her complaint, to-wit: an officer that insists that a citizen to stop praying during a police-citizen encounter, in the absence of any legitimate justification, per se violates the First Amendment.

This Court should deny the Petition.

Statement of the Case

A. Officers Lindsey and Stevens investigate a noise complaint and issue two citations to Sause.

Petitioner's appendices include the decisions of the district court and Court of Appeals as well as the Judgment of the Court of Appeals. App. 1a, 20, 35a. The appendices omit, however, Sause's complaint. It is the complaint, of course, upon which upon which both the district court and Court of Appeals based their decisions regarding respondent's motion to dismiss for failure to state a claim. App. 3a, 21a.

On November 22, 2013, Officers Stevens and Lindsey arrived at Sause's apartment in response to a noise complaint. App. 3a, 21a.[1] After she initially refused to answer the door, Sause let both officers into her home.

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[1] The Petition states Sause had been listening to a talk-radio show. Pet. 5. The complaint does say the noise complaint was related to her radio, but it does not state to what she was listening.

App. 3a. Sause picked up a booklet containing the Constitution and Bill of Rights which she keeps near her front door. *Id.* 21a–22a. Sause alleged Officer Lindsey mocked her and Officer Stevens left the apartment shortly after. App. 22a. Officer Lindsey and Sause's friend went into Sause's bedroom to kennel a dog and Officer Lindsey refused Sause entry into her own bedroom while he spoke with the friend. App. 22a.

After 20 minutes or more, while Stevens was outside the home, Lindsey informed Sause that she "was going to jail," although he "d[idn't] know [why] yet." App. 3a. Sause then asked Lindsey if she could pray, he said, "Yes," and she began praying. App. 3a–4a.

Sometime later, Stevens came back inside and asked what Sause was doing. App. 4a. Lindsey laughed and told Stevens "in a mocking tone" that Sause was praying, whereupon Stevens told Sause to get up and stop praying. App. 4a. Sause alleges the officers then "started 'looking through [their] booklet' for something to charge Sause with." App 4a. The officers ultimately "cited Sause for disorderly conduct and interfering with law enforcement." App. 4a

The validity of the citations to Sause has never been disputed in this case. It is noteworthy, however, that Sause did not press a claim under the Fourth Amendment for malicious prosecution.[2] Moreover, she

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[2] Sause did press a Fourth Amendment claim against Officer Lindsey based upon his refusal to let her enter her bedroom while he was in her apartment. App. 21a, 30a. The district court dismissed the claim holding, "refusal to allow Plaintiff to enter her bedroom while she was being questioned by the officers does not constitute a violation of her Fourth Amendment rights." *Id.* 30a.

did not claim that the Officers lacked reasonable suspicion for their encounter with her in the first place nor did she claim they lacked probable cause to issue the tickets.

B. Procedural background.

Sause filed her complaint *pro se* on November 20, 2015, alleging a variety of claims against a number of defendants.[3] All defendants moved to dismiss all claims. The district court granted the motion in its entirety. App. 34a. The district court's opinion made clear that Sause's First Amendment claim was brought against Stevens, but was not brought against Lindsey. 28a-31a.

On appeal to the Tenth Circuit Sause, represented by counsel, Sause appealed only the dismissal of the First Amendment claim. App. 1a–2a. Sause did not challenge (1) the district court's construction of her Fourth Amendment claim or (2) the dismissal of her Fourth Amendment claim. App. 19a (Tymkovich, C.J., concurring). Rather, she argued on appeal that her First Amendment claim was brought against both Stevens and Lindsey, App. 6a, notwithstanding that Lindsey told Sause she could pray and that she in fact did pray with Lindsey's permission.

The Tenth Circuit assumed, without deciding, that Sause could show that defendants plausibly violated her constitutional rights. App. 6a–7a. This assumption, made out of convenience, permitted the Tenth Circuit to first analyze whether the right at issue was clearly defined. *Id.* The court noted it had discretion to

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[3] Sause's *pro se* complaint is not included in Petitioner's appendices.

decide discretion to address the second prong first "in light of the circumstances in the particular case at hand." App. 6a (quoting *Pearson v. Callahan,* 555 U.S. 223, 236 (2009)).

The Tenth Circuit rejected Sause's assertion that, "[t]he right to be free from official retaliation for exercising one's First Amendment rights [was] also clearly established," and observed:

> Here, Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here—i.e., a scenario in which (1) officers involved in a legitimate investigation obtain consent to enter a private residence and (2) while there, ultimately cite an individual for violating the law but (3) in the interim, interrupt their investigation to order the individual to stop engaging in religiously-motivated conduct so that they can (4) briefly harass her before (5) issuing a citation.

App. 8a.

The Tenth Circuit also held this was not a case where the defendants' conduct was so obviously unlawful that the constitutional question was beyond debate so as to excuse the need for a case on point or the weight of authority. App. 9a, 15a. Accordingly, the Tenth Circuit unanimously concluded that the officers were entitled to qualified immunity. App. 15a.

Chief Judge Tymkovich wrote a brief concurring opinion to emphasize that Sause's claims fit more appropriately in the Fourth Amendment context. App. 17a.

Reasons to Deny Certiorari

This Court should deny the Petition for a writ of certiorari because the question framed in the Petition is not supported by the record, the Tenth Circuit's decision was correct, and this case is not a suitable vehicle for this Court to decide what limitations the Free Exercise clause may impose upon legitimate law enforcement activities.

A. The question presented in the Petition ignores the facts alleged in Sause's complaint and the premise to the question presented is not supported by the record.

The arguments in the Petition ignore the facts pled on the face of Sause's complaint. In fact, the Petition omits the complaint entirely. The Petition presents selective and paraphrased recitations as presented by the Tenth Circuit's opinion. Pet. 5–9.[4] The premise to the question presented in the Petition is without support in the record.

Sause poses the question of whether a citizen's rights under the First Amendment are violated when "forc[ed] to stop praying *absent any legitimate justification whatsoever*." Pet. 3. The face of the complaint shows the Officers were present for, and were pursuing, a legitimate law enforcement purpose. They were responding to and investigating a noise complaint. The Officers continued to pursue legitimate law enforcement purposes after asking her to stop praying, giving

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[4] The Petition does not cite or rely on the statement of facts set forth the by the district court, *see* App. 21a – 24a, which still paraphrases the complaint, but more closely tracks its language.

her two tickets.[5] The Petition essentially contradicts Sause's own complaint when it asserts the officers lacked "any legitimate justification" when asking her to stop praying.[6] Pet. 3.

It becomes apparent that the Petition is highly selective in the facts presented because the arguments therein make sense only if the instruction to stop praying is divorced from the circumstances of the investigation. Even then, the Petition makes sense only if the right to pray free from governmental interference is analyzed at the highest, most generalized level. But this Court has repeatedly warned circuit courts against defining the right at a general level and has summarily reversed the courts that have done so. *See, e.g., Mullenix v. Luna*, 136 S. Ct. 305, 311 (2015); *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004).

Sause twice claims the two tickets she received were unrelated to a noise complaint, which was the purpose of the investigation. Pet. 7, 30. First, it is not uncommon for a police encounter initiated for one reason to result in an enforcement action for another, perhaps unrelated reason. *See, e.g., Brigham City, Utah*

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[5] The Petition states the Officers also instructed Sause "to turn the radio down which had been playing throughout the entire interaction" as they went out the door. Pet. 7. This fact does not appear in Sause's complaint, but demonstrates the Officers pursued legitimate law enforcement purposes while on the premises, addressing a noise complaint, and left the premises when that purpose had been resolved.

[6] The Petition is also inconsistent with Sause's election to abandon any claim that her encounter with respondents was in any way unreasonable under the Fourth Amendment. App. 19a, 21a, 30a.

v. Stuart, 547 U.S. 398, 401, 406 (2006) (officers respond to noise complaint, make warrantless entry to home after seeing fight inside the home causing injury to an adult occupant; resulting enforcement action were charges for contributing to the delinquency of a minor, disorderly conduct, and intoxication); *and see Texas v. Brown*, 460 U.S. 730, 733–34 (1983) (license checkpoint resulting in heroin possession charges based on plain view doctrine). Second, the citations for interference and disorderly conduct are not "unrelated" to the noise complaint. The interference charge arose from Sause's refusal to answer the door in the first place and, under Kansas statutes, disorderly conduct is an appropriate charge for a noise complaint. *See* Kan. Stat. Ann. § 21-6203(A)(3).[7]

The Officers' conduct was *not* absent any legitimate justification whatsoever. The Petition should be denied.

B. An instruction to "stop praying" during a legitimate investigatory detention does not violate any clearly established constitutional right of which all reasonable officials would have known. The Tenth Circuit correctly held that, even assuming such conduct violates the First Amendment, the law is not clearly established.

"[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S.

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[7] Kan. Stat. Ann. § 21-6203(a)(3) defines disorderly conduct to include an act "the person knows or should know will alarm, anger or disturb others" to include "engaging in noisy conduct tending reasonably to arouse alarm, anger or resentment in others."

730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

Government officials can be put on notice by (1) a "case directly on point" holding the conduct at issue violates the law; or (2) "existing precedent must have placed the statutory or constitutional question beyond debate." *See al-Kidd*, 563 U.S. at 741 (the question must be "beyond debate"); *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) ("some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing"). Neither circumstance exists here.

1. **Petitioner concedes there is no caselaw involving sufficiently similar circumstances that squarely governs here.**

White v. Pauly explicitly instructs that, while a case directly on point is not required to defeat qualified immunity, for a right to be clearly established "'existing precedent must have placed the statutory or constitutional question beyond debate.'" 137 S. Ct. 548, 551 (2017) (quoting *Mullenix*, 136 S. Ct. at 308). The Tenth Circuit adhered to "the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *Id.* at 552 (quoting *al-Kidd*, 563 U.S. at 742). Further "the clearly established law

must be 'particularized' to the facts of the case." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The Tenth Circuit observed, "Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a. The Tenth Circuit understood the dispositive question for qualified immunity "is whether the violative nature of [the defendants'] *particular conduct* is clearly established" App. 7a (quoting *Mullenix*, 136 S. Ct. at 308) (internal quotation marks and citation omitted). Given that understanding, the court set forth the particularized facts in question to be a scenario

> in which (1) officers involved in a legitimate investigation obtain consent to enter a private residence and (2) while there, ultimately cite an individual for violating the law but (3) in the interim, interrupt their investigation to order the individual to stop engaging in religiously-motivated conduct so that they can (4) briefly harass her before (5) issuing a citation.

App. 8a.

Contrary to the assertion in the Petition, the Tenth Circuit did not require an identical case to show that such a right was clearly defined. Pet. 11–12. Rather, the court noted the need to cite "a case or cases that make clear the violative nature of [the defendants'] *particular* conduct" to meet the clearly established prong. App. 10a (quoting *Mullinex*, 136 S. Ct. at 310) (internal quotation marks and citation omitted). Qualified immunity is warranted where no precedent

squarely governs the facts at hand. *See Mullenix*, 136 S. Ct. at 310.

It is beyond question that, on November 22, 2013, there was no case or authority that holds the First Amendment is violated by an instruction to "stop praying" (or stop engaging in religiously-motivated conduct) during the course of a legitimate police investigatory encounter. Petition cites no such case or authority. There is none, and the Tenth Circuit said as much, "because Sause fails to identify—and our independent research fails to yield—any such authority, we conclude that the law isn't clearly established." App. 10a.

The Petition does not suggest otherwise. Sause instead poses an alternate set of facts by asserting the investigation was no longer ongoing. She argues the officers made certain remarks or took certain actions while they were in her apartment, and that those remarks or actions transformed the investigation into nothing more than harassment. Pet. 30. This disregards the facts pleaded on the face of the complaint which were discussed by the courts below and which show the officers were conducting an ongoing investigation. The investigation, which started *before* the request that she stop praying, continued *after* the request and concluded with the issuance of two tickets.

Even accepting as true that, during the investigation, the respondents made insensitive and boorish remarks and took actions unrelated to the investigation, there is still no violation of clearly established law. The "right" (as articulated by Sause) "to pray in the privacy of one's home free from governmental interference in the absence of a legitimate law enforcement interest"

is not violated by rude remarks or conduct during an ongoing, legitimate investigation.

2. The decision below is wholly consistent with *Hope v. Pelzer*. The Tenth Circuit did not require a case directly on point; rather, the court correctly held existing precedent does not place the constitutional right claimed by the Petitioner beyond debate.

The Petition contends Sause overcomes qualified immunity by asserting the instruction to stop praying during the investigation was so egregious as to be "clearly unlawful." Pet. 4, 13–14 (citing *Hope v. Pelzer*, 536 U.S. at 739, 741). By its nature, this "obviously unlawful" exception does not lend itself to a bright-line rule. But this Court made clear the exception applies to only the most egregious or outrageous conduct which existing law clearly declares unlawful. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-79 (2009) (discussing rule while granting qualified immunity for strip search of middle school student); *see also Camreta v. Greene*, 563 U.S. 692, 728 (2011) ("That rule permits clearly established violations to be found when extreme though unheard-of actions violate the Constitution.") (Kennedy, J., dissenting). Asking the subject of a legitimate investigatory encounter to stop praying for the few minutes until the officers concluded their investigation is not an example of "extreme though unheard-of actions."

i. The Tenth Circuit squarely addressed, and correctly rejected, the argument advanced by the Petition.

Sause argues the instruction to "get up" and "stop praying" is an example of extreme though unheard-of

actions, and argues the decision below conflicts with *Hope v. Pelzer*. Sause goes so far as to claim that the Tenth Circuit did not "grapple with [*Hope*'s] admonition that qualified immunity can be defeated 'even in novel factual circumstances.'" Pet. 12. In *Hope*, this Court held it was clearly established that handcuffing an inmate to a hitching post—once for approximately seven hours and for purely punitive reasons—clearly violated the Eighth Amendment. 536 U.S. at 742. Sause cites this case for the premise that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741.[8] The Tenth Circuit did not disregard this aspect of qualified immunity jurisprudence; rather, it expressly addressed it with respect to Sause's claim.

The Tenth Circuit acknowledged a plaintiff may meet her burden of showing the law to be "clearly established" by citing a Supreme Court or Tenth Circuit decision on point, or showing that the weight of authority from other circuits clearly establishes the right. App. 8a. The Tenth Circuit said, however, these are not the only options to carry the burden of showing clearly established law. App. 9a. The Tenth Circuit ob-

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[8] This Court's decision in *Hope*, did not turn on the question of "novel factual circumstances." 536 U.S. at 741. Rather, the Court held the hitching post practices employed in an Alabama prison violated the Eighth Amendment (1) in light of binding circuit precedent, and (2) as illustrated by a series of Department of Justice advisories to Alabama that its actual practice of using the hitching post as punishment violated the Eighth Amendment. *Id.* at 742–45 (citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974), noting that pre-1981 decisions by the Fifth Circuit were binding in the Eleventh Circuit).

served that "general statements of the law are not inherently incapable of giving fair and clear warning to officers." App. 9a (internal citations and quotes omitted). And it further "recognize[d] that Sause need not identify 'a case *directly* on point' to show that the law is clearly established." App. 9a (quoting *al-Kidd*, 563 U.S. at 741). Finally, the Tenth Circuit acknowledged that "sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." App. 9a (quoting *Browder v. City of Albuquerque*, 787 F.3d at 1082).

In sum, the Tenth Circuit fully addressed the very argument made in the Petition, concluding "while the conduct alleged in this case may be obviously unprofessional, we can't say that it's 'obviously unlawful.'" App. 9a. The court explained:

> [I]t certainly wouldn't be obvious to a reasonable officer that, in the midst of a legitimate investigation, the First Amendment would prohibit him or her from ordering the subject of that investigation to stand up and direct his or her attention to the officer—even if the subject of the investigation is involved in religiously-motivated conduct at the time, and even if what the officers say or do immediately after issuing that command does nothing to further their investigation.

App. 9a. Finally, the Tenth Circuit found this is not "a case where the defendants' conduct is so obviously egregious ... in light of prevailing constitutional principles that less specificity is required from prior case law to clearly establish the violation." App. 9a (internal quotations and citations omitted).

Petitioner asserts the "failure" to cite *Hope* shows a disregard by the Tenth Circuit of this aspect of this Court's qualified immunity jurisprudence. Petitioner is plainly wrong and ignores the careful attention given by the Tenth Circuit to the selfsame argument. The Tenth Circuit correctly considered and rejected Petitioner's argument.

ii. Petitioner frames the constitutional question at such a high level of generality that no meaningful rule can be discerned.

The Petition repeatedly quotes an accurate, but incredibly broad, discussion of the right to be free of government suppression of religious belief or practice.[9] Time and again this Court has warned against analyzing for clearly established law at a high level of generality. *Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established") (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)); and *al-Kidd*, 563 U.S. at 742 ("We have repeatedly told courts ... not to define clearly established law at a high level of generality.").

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[9] The Petition repeatedly cites and quotes from *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). Pet. 3, 17, 18, 19, 20, 22, 23, 25 n.10. The Petition sets forth the following quote from *Lukumi*, 508 U.S. at 523, no fewer than four times:

> The principle that government may not ... suppress religious belief or practice is so well understood that few violations are recorded in our opinions.

Pet. 3, 17, 18, 20, and quotes a fragment of that citation twice more. *Id.* 19, 23.

In fact, this Court summarily reversed appellate courts for doing so. For example, this Court summarily reversed the Ninth Circuit's denial of qualified immunity where the conduct at issue was shooting a fleeing suspect in the back. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004). There, the Ninth Circuit based its decision on *Graham v. Connor*, 490 U.S. 386 (1989) and *Tennessee v. Garner*, 471 U.S. 1 (1985). *Id.* at 199. In *Brosseau*, this Court said *Graham* and *Garner* were "cast at a high level of generality" and therefore did not suffice to show that the defendant's action violated a clearly established Fourth Amendment right "in this more 'particularized' sense." *Id.* at 199–200 (quoting *Saucier v. Katz*, 533 U.S. at 202).

This Court also, in *Mullenix v. Luna*, summarily reversed the Fifth Circuit for denying an officer qualified immunity in another case involving the fatal shooting of a fleeing suspect. 136 S. Ct. at 312. This Court again noted the error of "defin[ing] the qualified immunity inquiry at a high level of generality . . . and then fail[ing] to consider that question in 'the specific context of the case.'" *Id.* at 311 (quoting *Brosseau*, 543 U.S. at 198). This Court has held repeatedly that, to defeat qualified immunity, the constitutional right claimed by the petitioner has to be "beyond debate." *See, e.g., Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (quoting *al-Kidd*, 563 U.S. at 741).

Sause cites *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), for the accurate but over-generalized premise that government may not suppress religious belief or practice. Pet. 3, 18–19, 22-23. This presents the issue of religious freedom at the absolute highest level of generality and no government official could read *Lukumi*, and conclude "beyond

debate" that the Officers' conduct herein violated the First Amendment. *See al-Kidd*, 563 U.S. at 741.

Lukumi addressed a challenge to a city ordinance dealing with the ritual slaughter of animals. Only the most general statement of First Amendment rights in that case could be said to apply to Sause's claim, and then only in the abstract. Nothing in *Lukumi* can be read to even loosely relate to the boundaries of law enforcement conduct during a legitimate investigation, let alone the particularized conduct set forth in Sause's complaint. The Petition goes on to cite a number of First Amendment cases, but its description of those cases makes clear they do not involve conduct similar to the particularized conduct that of which Sause complains in her complaint. Pet. 20–27. A case-by-case analysis is unhelpful because the Petition suggests that *any* limitation or impingement on the free exercise of religion violates the First Amendment.

iii. This Court's precedent shows a variety of legitimate government interests that may impinge upon First Amendment rights without violating the First Amendment.

Contrary to the Petition's central premise, this Court held in a variety of circumstances that a legitimate government interest may impinge upon rights under the First Amendment yet pass constitutional muster. For instance, this Court held that the Free Exercise Clause does not exempt religious persons from the dictates of neutral laws of general applicability. *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 878–79 (1990). Similarly, "our cases establish the general proposition that a law that

is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Lukumi*, 508 U.S. at 531.

Far from the bright-line rule the Petition suggests be drawn that forbids *any* burden on religious exercise, this Court applies a balancing test to prevent a "substantial burden" that lacks sufficient justification. "The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (First Amendment right to religious freedom while incarcerated is not violated by restrictions on the exercise of that right in order to advance valid penological objectives).

"[A]ctivities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). And "a governmental regulation is sufficiently justified, despite its incidental impact upon First Amendment interests, 'if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on ... First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" *Accord Young v. Am. Mini Theatres*,

Inc., 427 U.S. 50, 79–80 (1976) (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

Finally, the Petition does not cite, and cannot be squared with, this Court's decision in *Reichle v. Howards*, 566 U.S. 658 (2012). That case noted "[t]his Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause ... ." *Id.* at 664–65. *Reichle* tells us police-citizen encounters that are reasonable under the Fourth Amendment do not violate the First Amendment.

The district court's analysis of Sause's Free Exercise claim readily addresses, and disposes of, the Petition's generalized assertion.

> Officers [Stevens] and Lindsey were investigating a noise complaint in Plaintiff's building, which led them to her apartment. While Officer [Stevens]'s instruction to Plaintiff to stop praying may have offended her, it does not constitute a burden on her ability to exercise her religion. Plaintiff fails to provide any allegations that would suggest Officer [Stevens]'s actions coerced her into conduct contrary to her religious beliefs, or that he otherwise prevented her from practicing her religion. Rather, he merely instructed her to stop praying while the officers were in the middle of talking to her about a noise complaint they had received.

App. 29a–30a. The imposition upon Sause was brief and resulted directly from a legitimate and ongoing investigation of a noise complaint. The government's interest in investigating crimes and enforcing the criminal laws outweigh an incidental burden on First

Amendment rights. *See, Branzburg v. Hayes*, 408 U.S. 665, 683–95 (1972).

The premise of the Petition is unworkable and fails to apprehend the effect it would have on day-to-day law enforcement. The rule posed by Sause would require law enforcement to cease any enforcement or investigatory activity any time a citizen chose to pray in the midst of that activity. For instance, could the subject of a traffic stop for suspected DUI delay the investigation indefinitely by starting an endless prayer? This Court's precedents clearly show even severe, but brief intrusions upon personal liberty and security are constitutionally permissible.

This Court observed in *Terry v. Ohio* that a stop and frisk is a brief but severe "intrusion upon cherished personal security [that] must surely be an annoying, frightening, and perhaps humiliating experience," it is nonetheless constitutionally permissible under certain circumstances. 392 U.S. 1, 24–25, 27–28 (1968). In *Michigan v. Long*, this Court also observed there is no ready test to determine the reasonableness of a police-citizen encounter other than by balancing the need for governmental intrusion against the invasion upon personal liberties entailed by the encounter. *Michigan v. Long*, 463 U.S. 1032, 1046 (1983) (internal citations and quotation omitted). Such intrusions upon personal liberties are reasonable when weighed against "the legitimate interest in 'crime prevention and detection.'" *Id.* at 1047 (quoting *Terry*, 392 U.S. at 22).

Government intrusions that briefly impinge on personal liberties are subject to a balancing of a variety of competing interests—especially in the context of the First and Fourth Amendments. Thus, the general

"principle that government may not ... suppress religious belief or practice," *Lukumi*, 508 U.S. at 523, does not establish that the respondents' conduct alleged in Sause's complaint was so obviously unlawful that the constitutional question was beyond debate. Accordingly, the Tenth Circuit correctly held respondents are entitled to qualified immunity.

Conclusion

The Court should deny the petition.

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Date: January 19, 2018

No. 17–742

IN THE

Supreme Court of the United States

MARY ANNE SAUSE,

Petitioner,

v.

TIMOTHY J. BAUER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER

The Tenth Circuit's decision creates a serious conflict with precedents of this Court, transforming qualified immunity into a shield that will protect even conduct that violates clearly established First Amendment rights. The Tenth Circuit held that the officers were entitled to qualified immunity because no prior case has addressed an identical "factual scenario," App. 8a, even though this Court's precedent rejects any such requirement. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Specifically, the Tenth Circuit permitted a substantial burden to be placed on Petitioner's religious practice even though Petitioner's complaint alleged (1) that the officers' only motivation in burdening Petitioner's religion was to "harass her," App. 7a, and (2) that the officers' actions did "nothing to further their investigation," App. 9a.

That holding conflicts with this Court's precedent. In *Hope*, this Court "expressly rejected a requirement that previous cases be 'fundamentally similar'" or involve "'materially similar' facts." 536 U.S. at 741 (citation omitted). Respondents contend that the decision below is consistent with *Hope* because it recognized the theoretical possibility that *some* case could present such "obviously egregious" facts that *Hope* might apply. Opp. 14. But if *this* case does not satisfy that standard, *Hope* is effectively a dead letter in the Tenth Circuit.

Summary reversal, or plenary review, is appropriate not only to correct the Tenth Circuit's mistaken view of the law, but to affirm *Hope*'s continuing vitality and ensure that lower courts do not make the qualified immunity bar impossible to clear, even in cases

involving egregious and obvious constitutional violations.

I. THE TENTH CIRCUIT'S MISAPPREHENSION OF QUALIFIED IMMUNITY UNDER *HOPE V. PELZER* WARRANTS THIS COURT'S REVIEW.

A. The Court of Appeals Defied this Court's Precedent When It Concluded that Officers Lacked Fair Warning that the First Amendment Bars Imposing a Substantial Burden on Religion Without Any Legitimate Government Interest.

Qualified immunity "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). Thus the "salient question" in determining whether law is clearly established "is whether the state of the law at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (alterations in original) (quoting *Hope*, 536 U.S. at 741). This Court's precedent unambiguously holds that defendants may have such "fair warning" without an existing case presenting an identical "factual scenario." App. 8a. The Tenth Circuit's departure from this precedent warrants this Court's review.

1. Every officer has, and had at the time of Respondents' actions, fair warning that it is unconstitutional to substantially burden the free exercise of religion without *some* legitimate government interest. *See, e.g.*, *Church of Lukumi Babalu Aye, Inc. v. City of*

Hialeah, 508 U.S. 520, 531–32 (1993); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Even in the prison context, where constraints on liberty are at their peak, it is clearly established that government officials cannot substantially burden an incarcerated person's right to religious exercise—including by preventing prayer—unless "it is reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349–53 (1987). *See also Young v. Coughlin*, 866 F.2d 567, 570 (2d Cir. 1989).

Here, Ms. Sause was not even under arrest, much less incarcerated, when her First Amendment rights were violated. In fact, she was in the "protected privacy" of her home. *Kyllo v. United States*, 533 U.S. 27, 34 (2001). Yet the officers ordered her to stop praying, despite the absence of any legitimate government purpose. That unlawful conduct violated Ms. Sause's clearly established rights under the First Amendment.

First, Ms. Sause's complaint clearly alleges a substantial burden on the exercise of religion. When government officials put "substantial pressure on an adherent to modify [her] behavior . . ., a burden upon religion exists." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). This Court has long recognized that engaging in prayer is a core religious exercise. *Engel v. Vitale*, 370 U.S. 421, 424 (1962) ("There can, of course, be no doubt that . . . prayer is a religious activity").

Coercion to cease religious exercise is a substantial burden. *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.) (noting that whether a

burden is substantial depends "on the coercive impact of the government's actions"). *See also Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly"). And an order to stop praying from a police officer is coercive. *McEachin v. McGuinnis*, 357 F.3d 197, 204–05 (2d Cir. 2004) (holding that inmate stated free exercise claim when he alleged he would be "disciplined for failing to obey an order expressly given to him by a corrections officer who knew that completion of the task would require plaintiff to abandon religious prayers in which he was then engaged"); *United States v. Allen*, 813 F.3d 76, 88 (2d Cir. 2016) ("The command of an officer, legally entitled to make an arrest . . . [is] a sufficient exercise of authority to require the suspect to comply.").

It has been understood since colonial days that preventing a citizen from praying in her own home substantially infringes on her free exercise of religion. As an example of religious persecution under colonial rule, Thomas Jefferson described acts of the Virginia Assembly that targeted Quakers by prohibiting "all persons from suffering their meetings in or near their houses." Thomas Jefferson, *Notes on the State of Virginia* 261–62 (J. Stockdale 1787). Indeed, as this Court has recognized, "the First Amendment . . . tried to put an end to governmental control of religion and of prayer." *Engel*, 370 U.S. at 435. The direct suppression of religious expression in the home—rare as it may be today—was among the ills that animated the adoption of the First Amendment. *Id.* at 433 (describing "persecutions of people like John Bunyan who

persisted in holding 'unlawful (religious) meetings'") (citing *A Relation of the Imprisonment of Mr. John Bunyan*, reprinted in *Grace Abounding and The Pilgrim's Progress* 103–132 (Brown ed. 1907), which describes Bunyan's house arrest). *See also* Br. for State of Texas at 9–10.

Second, Ms. Sause's complaint clearly alleges facts demonstrating that the officers lacked any legitimate government interest in ordering her to stop praying, as the Tenth Circuit recognized. When Stevens asked Ms. Sause what she was doing, Lindsay "laughed and told Stevens 'in a mocking tone' that Sause was praying." App. 4a. The officers "interrupt[ed] their investigation," App. 8a, "so they could harass her," App. 7a. Perhaps most significant, this harassment did "nothing to further their investigation." App. 9a. These allegations belie any legitimate government interest.

Third, because Ms. Sause alleges that her religious practice was substantially burdened in the absence of any legitimate government interest, these two principles clearly establish that the officers do not, at the pleading stage, enjoy qualified immunity against her First Amendment claim. As Chief Judge Tymkovich put it, the facts alleged in the complaint were "inconsistent with any legitimate law enforcement purpose capable of justifying" the officers' conduct. App. 19a.[1] No "reasonable officer" could believe that the Constitution permits him to burden religious

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[1] Tenth Circuit thus assumed (correctly) that the officers violated Ms. Sause's First Amendment rights, because she plausibly alleged that the officers "ordered her to stop praying" not for any legitimate interest, but "so they could harass her." App. 7a.

practice in the absence of any legitimate law enforcement interest. *Saucier*, 533 U.S. at 202.

2. The Tenth Circuit's decision that the officers were nonetheless entitled to qualified immunity rests on its conclusion that no prior case of which it was aware "has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." App. 8a. But imposing that as a requirement to defeat qualified immunity conflicts with this Court's decision in *Hope*, where this Court held that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. at 741. As this Court has explained, the "easiest cases don't even arise" because "outrageous conduct," such as the officers' mistreatment of Ms. Sause, "obviously will be unconstitutional." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009). In other words, "[c]ertain actions so obviously run afoul of the law" as to overcome qualified immunity even under factual circumstances not yet recorded by a court. *Hope*, 536 U.S. at 753–54. That is precisely the case here. Because it is "so well understood" that prohibiting citizens from engaging in religious practices (such as prayer) in the absence of any legitimate government interest violates the First Amendment, relatively "few violations are recorded in [appeals court] opinions." *Lukumi*, 508 U.S. at 523.

Respondents argue that the Tenth Circuit's decision did not conflict with *Hope* because the court inquired whether the alleged conduct was "obviously unlawful." Opp. 14. To be sure, the court of appeals briefly acknowledged that a factually similar case

may not be required if defendants' conduct is "obviously egregious." App. 9a (citing *Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008)). But that standard, too, conflicts with *Hope*. Under *Hope*, qualified immunity does not rise and fall with whether the facts were "obviously egregious" in the eyes of the court. Rather, "the Court of Appeals ought to have asked . . . whether the state of the law . . . gave respondents fair warning that their alleged treatment of [Ms. Sause] was unconstitutional." *Hope*, 536 U.S. at 741. Because this Court's precedent makes it abundantly clear that government officials cannot burden religious exercise for the purposes of harassing religious adherents, the court of appeals would unavoidably have reached the opposite conclusion had it framed the question in this way.

Moreover, even taking the Tenth Circuit's approach on its own terms, if *this* case does not present sufficiently "egregious" conduct to defeat qualified immunity—notwithstanding the absence of any factually identical case—then *Hope* has effectively been overruled *sub silentio* in the Tenth Circuit.

Respondents further depart from this Court's precedent by arguing that Ms. Sause frames her free exercise rights at "a high level of generality." Opp. 15. Not so. This Court has never held that officers presented with a clearly established rule—*e.g.*, religious practice may not be substantially burdened in the absence of a legitimate government interest—may freely defy that rule and interfere with a citizen's religious practice for no other reason than an intent to harass the citizen so long as the *specific* burden has not be recorded in clearly established precedent. Where, as here, "the violation was so obvious," officers have "fair

warning that their conduct violate[s] the Constitution" even absent more specific case law. *Hope*, 536 U.S. at 741.

Respondents (at Opp. 16) also analogize this case to *Brosseau v. Haugen*, 543 U.S. 194 (2004), and *Mullenix v. Luna*, 136 S. Ct. 305 (2015), but both of those cases involved the reasonableness of searches under the Fourth Amendment. As the Court explained, because the Fourth Amendment's proscriptions are "cast at a high level of generality" and officers must make difficult judgments about whether a search or seizure is reasonable in widely varying situations, *Brosseau*, 543 U.S. at 199, "specificity is especially important in the Fourth Amendment context" for overcoming qualified immunity, *Mullenix*, 136 S. Ct. at 308. *See* Pet. 17–18. But Ms. Sause is not asking the Court to decide whether the officers' investigation was unreasonable—a question that would implicate the concerns in *Brosseau* and *Mullenix*—but rather whether the officers had fair warning that ordering a religious adherent to stop praying solely for the sake of "harass[ing]" her, and without any legitimate government purpose, violated her First Amendment rights.

The "constitutional rule" that officers may not impose a substantial burden upon religious exercise without a legitimate government interest "appl[ies] with obvious clarity to the specific conduct in question." *Hope*, 536 U.S. at 741 (citation omitted). This Court should grant review and reverse the Tenth Circuit's contrary judgment.

B. Respondents Attempt to Manufacture Factual Disputes Where There Are None.

Respondents also attempt to prevent review of the Tenth Circuit's judgment by manufacturing factual disputes, rather than taking the facts alleged in Ms. Sause's complaint as the Tenth Circuit found them. *E.g.*, Opp. 11 ("Sause instead poses an alternate set of facts").

Disregarding the Tenth Circuit's conclusion that the complaint alleged that the officers acted without any legitimate government interest, Respondents characterize their harassment as a polite request for Ms. Sause to pause her prayer so that they could conclude their investigation. Opp. 7. And they further contend that because they were responding to a noise complaint, the "circumstances of the investigation" provided blanket justification for their conduct. Opp. 7.[2]

Whether Respondents can prove these defenses on remand is beside the point. The issue before this Court is whether, taking as true the facts pleaded in the complaint and considered by the Tenth Circuit, the court of appeals created a conflict with this Court's precedent by concluding that a more specific, on-point case is required before qualified immunity may be defeated. That is, the Court must consider whether the

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[2] *See, e.g.*, Opp. 6 ("The Officers continued to pursue legitimate law enforcement purposes after asking her to stop praying"), Opp. 12 ("[a]sking the subject . . . to stop praying for the few minutes until the officers concluded their investigation"), Opp. 19 ("The imposition upon Sause was brief and resulted directly from a legitimate and ongoing investigation").

court of appeals created a conflict with this Court's precedent by applying qualified immunity even though, on the facts alleged, the government "mock[ed]" Ms. Sause's prayer, "demanded that she '[g]et up' and '[s]top praying,'" and did so not for any legitimate investigative purpose but "so they could harass her." App. 4a, 7a. Respondents may attempt to demonstrate on remand that, as a factual matter, their actions *did* further a legitimate interest. But on this record, the complaint established that the officers acted purely for the purpose of harassment. *See* App. 19a ("Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose capable of justifying a continuing police intrusion in her home").

The Court can and should disregard Respondents' effort to manufacture a barrier to this Court's review by disputing Ms. Sause's allegations. The only issue presented is whether the Tenth Circuit contravened this Court's precedents in requiring a case on point despite the "'fair and clear warning'" that the officers' conduct violated the First Amendment. *Hope*, 536 U.S. at 746 (citation omitted). Because the court of appeals created a clear conflict with *Hope*, this Court's review is necessary.

II. DENIAL OF QUALIFIED IMMUNITY HERE WILL NOT HINDER LAW ENFORCEMENT.

Respondents warn that denying them qualified immunity would negatively impact "day-to-day law enforcement." Opp. 20. That unsupported assertion does not counsel against review. In fact, *amici curiae* former federal prosecutors explain that "legitimate law-enforcement interests will *not* be undermined by

denying qualified immunity based on the allegations in petitioner's complaint." Br. of Former Federal Prosecutors at 1. *Amicus* State of Texas agrees that notwithstanding the "important function" qualified immunity serves, "in the rare instances where . . . clearly established rights are infringed, qualified immunity must necessarily give way," and "this is one of those rare cases." Br. for State of Texas at 2.

It is exceptional that former federal prosecutors and a State, both of whom support robust application of the doctrine of qualified immunity (*see, e.g.*, Br. of Former Federal Prosecutors at 1; Br. for State of Texas at 1), would file briefs in favor of a petitioner whose claim was dismissed on that basis. But this case is exceptional.

As *amici* explain, enforcing the "important limits" on qualified immunity would "reassure the public that officers who act in knowing disregard of the public's constitutional rights will be held liable for abuses." Br. of Former Federal Prosecutors at 1. "[E]rroneous grants of qualified immunity," by contrast, "undermine the rule of law and strain the relationship between police and the public, hindering law enforcement in fulfilling its responsibilities." *Id.* at 4–5. Thus, contrary to Respondents' arguments, denying qualified immunity in this case of extreme unlawful conduct will *vindicate* the doctrine of qualified immunity, so that reasonable officers can rely on it in the future. *See White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citation omitted). Moreover, it will clarify the application and continuing vitality of *Hope*.

Indeed, while Respondents assert that reversing the Tenth Circuit would result in a dramatic expansion of constitutional claims (*see*, *e.g.*, Opp. 18, 20), it is their position, rather than Ms. Sause's, that calls for a sweeping rule: that qualified immunity must be granted even for violations of citizens' clear, long established rights unless a prior court has addressed identical facts in a prior case. Particularly given that the courts of appeals can, as the Tenth Circuit did here, simply assume *arguendo* the constitutional violation, Respondents' rule would permit egregious violations of the Constitution to occur over and over again, yet qualified immunity would never be overcome because of the absence of a case directly on point. Denying qualified immunity when an official shows "extraordinary contempt of a law abiding citizen" and engages in "reprehensible conduct," App. 17a (Tymkovich, C.J., concurring), preserves the legitimacy of grants of qualified immunity for conduct that does not violate clearly established law.

CONCLUSION

The Court should either summarily reverse the judgment of the court of appeals, or grant the petition for a writ of certiorari, set the case for full merits briefing and argument, and reverse the judgment below.

Respectfully submitted.

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No. 17-742

In The
Supreme Court of the United States

MARY ANNE SAUSE,

Petitioner,

v.

TIMOTHY J. BAUER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF FORMER FEDERAL PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are former federal prosecutors who have extensive familiarity with the needs of law enforcement and the challenges faced by law-enforcement officers in interacting with the public. They recognize the important role that qualified immunity plays in permitting reasonable police officers to exercise difficult judgments without fear of civil liability. They also recognize the important limits that this Court has drawn on qualified immunity, limits which reassure the public that officers who act in knowing disregard of the public's constitutional rights will be held liable for abuses.

Amici file this brief to emphasize that legitimate law-enforcement interests will not be undermined by denying qualified immunity based on the allegations in petitioner's complaint. To the contrary, reaffirming that officers who interfere with prayer for the purpose of harassment face civil liability will promote respect for the rule of law and strengthen relationships between the police and the public, ultimately easing the task of law enforcement.

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[1] The parties in this case received timely notice under Rule 37.2(a) and have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Amici listed below urge this Court to grant the petition for certiorari and reverse the Tenth Circuit's judgment.

Edwin Meese III served as the 75th Attorney General of the United States from 1985 to 1988. He previously served as Counselor to the President and was a member of the National Security Council. He also previously worked in the District Attorney's Office of Alameda County, California, where he prosecuted felony cases. He currently sits on the National Advisory Board of the Center for Urban Renewal and Education and is a Distinguished Visiting Fellow with the Hoover Institution at Stanford University.

Matthew Orwig served as the U.S. Attorney for the Eastern District of Texas for six years. He previously served as a Legal Advisor in the Executive Office of U.S. Attorneys and as an Assistant U.S. Attorney in the Northern District of Texas. He served a total of three Presidents and five Attorneys General in the Department of Justice.

Richard Roper served as the U.S. Attorney for the Northern District of Texas, leading an office of 93 attorneys in criminal and civil matters. He previously served as Assistant U.S. Attorney and as Assistant District Attorney in Fort Worth, Texas—spending 26 years in these three positions. He has personally prosecuted more than 150 jury trials involving a broad range of crimes.

Joseph Russoniello served two terms as the U.S. Attorney for the Northern District of California.

Before that, he served as an Assistant District Attorney for the City and County of San Francisco and as a Special Agent with the Federal Bureau of Investigation. He also served on the U.S. Attorney General's Advisory Committee at the Department of Justice.

SUMMARY OF ARGUMENT

Just as the application of qualified immunity to officers who reasonably believed their conduct to be permissible is essential to allowing law enforcement to take discretionary actions without fear of liability, *Pearson* v. *Callahan*, 555 U.S. 223, 244 (2009), denial of qualified immunity and imposition of civil liability where appropriate is important to aid law-enforcement objectives by encouraging public trust and cooperation with legitimate law-enforcement investigatory efforts. This Court's review is needed to make clear that in cases like this one—where the constitutional violation is obvious—affording qualified immunity can actually hinder legitimate law-enforcement interests by straining the relationship between the public and the police.

In this case, the Tenth Circuit held that officers could reasonably believe that if interfering with prayer is justified in *some* circumstances, then interfering with prayer must be permissible in *all* circumstances—even if it is done solely for purposes of harassment. But the conclusion does not follow. Even if officers could permissibly interfere with prayer in some circumstances, no reasonable officer could

believe it permissible to interfere with prayer solely for purposes of harassment. And it is hardly surprising that no case has ever held—or had to hold—as much. If permitted to stand, the Tenth Circuit's decision threatens to upset the careful balance this Court has struck in its qualified-immunity precedent and to undermine vital law-enforcement objectives. The petition should be granted.

ARGUMENT

I. This Court's Review Is Needed To Resolve A Serious Conflict With This Court's Cases That Threatens Vital Law-Enforcement Interests.

Denying qualified immunity when officers violate "clearly established * * * constitutional rights of which a reasonable [officer] would have known," *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982), is just as important to law enforcement as granting qualified immunity when a right is unclear. See *Salazar-Limon* v. *City of Houston*, 137 S. Ct. 1277, 1283 (2017) (Sotomayor, J., dissenting from denial of certiorari) ("The erroneous grant of summary judgment in qualified-immunity cases imposes no less harm on society as a whole, than does the erroneous denial of summary judgment in such cases." (internal quotation marks and citations omitted)). That is so because erroneous grants of qualified immunity undermine the rule of law and strain the relationship between police and the public, hindering law enforcement in fulfilling its

responsibilities. Regrettably, this is just such a case. This Court's review is needed to correct the error, resolve the conflict with this Court's cases, and restore the proper relationship between law enforcement and the public.

As an initial matter, this Court has firmly rejected any "rigid gloss on the qualified immunity standard" that would require "the facts of previous cases [to] be 'materially similar' to" the case at hand. *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002); see also *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014). But that is precisely what the Tenth Circuit required here. App. 8a-10a (holding that petitioner could "only satisfy the clearly-established prong by citing a case or cases that make clear 'the violative nature of [the defendants'] *particular* conduct,'" i.e., "interrupt[ing] their investigation to order [her] to stop [praying] so that they can * * * briefly harass her before * * * issuing a citation" (first alteration in original)). The Tenth Circuit thus concluded that while respondents' conduct "may be obviously unprofessional, we can't say that it's 'obviously unlawful.'" App. 9a.

But this Court has held that "general statements of the law are not inherently incapable of giving fair and clear warning," and there are "general constitutional rule[s] * * * [that can] apply with obvious clarity to the specific conduct in question." *United States* v. *Lanier*, 520 U.S. 259, 271 (1997); see also *Hope*, 536 U.S. at 741 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances[.]"). Cases involving "fundamentally

similar" or "materially similar" facts are "not necessary" for every reasonable officer to know of certain constitutional rights. *Hope*, 536 U.S. at 741.

This approach—i.e., permitting general rules to give fair and clear warning that officers' conduct is impermissible—is important because the most obvious and egregious constitutional violations will be least likely to be committed by police officers and thus least likely to be discussed in the case law. *Lanier*, 520 U.S. at 271 (explaining that "[t]he easiest cases don't even arise," but "it does not follow that if such a case arose, the officials would be immune" (citation omitted)). This Court thus holds that the "very action in question" need not have "been held unlawful" previously for an officer to be held liable. *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Any other rule would threaten to immunize the very worst violations. Regrettably, that is what the Tenth Circuit has done here. And in such cases, granting qualified immunity disserves citizens and law enforcement alike.

The holding below upsets the balance this Court has struck in its qualified immunity jurisprudence, which "is important to 'society as a whole.'" *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (citation omitted). "Qualified immunity balances * * * the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231. It strikes this balance by ensuring officials "reasonably can anticipate when their conduct may give

rise to liability," *Lanier*, 520 U.S. at 270, so they need not second-guess every discretionary action they take, while also prohibiting officers from "knowingly violat[ing] the law." *White*, 137 S. Ct. at 551 (citation omitted).

Perversely, under the Tenth Circuit's approach, qualified immunity would immunize the most flagrant constitutional violations—those that are so far outside the norm they infrequently arise. This concern is not merely theoretical. Often, the "easiest cases don't even arise" because "outrageous conduct" such as the conduct here "obviously will be unconstitutional." *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377 (2009). The behavior described in petitioner's complaint is a perfect example. As Chief Judge Tymkovich's concurrence recognized, that behavior is nothing short of "reprehensible" and demonstrates "extraordinary contempt of a law abiding citizen." App. 17a. Immunizing such conduct serves no legitimate law-enforcement interest.

To the contrary, immunizing egregious behavior can harm those interests by communicating to the public that officers may violate the law with impunity. This message is just the opposite of what the public should understand: "The police must not only respect, but also protect the rights guaranteed to each citizen by the Constitution." U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN

POLICE AND CITIZENS (Sept. 2003).[2] Public confidence in law-enforcement officials fulfilling their duty to respect and protect the public's constitutional rights is critical for effective law enforcement. See POLICE EXECUTIVE RESEARCH FORUM, CONSTITUTIONAL POLICING AS A CORNERSTONE OF COMMUNITY POLICING 3 (Apr. 2015)[3] ("It is impossible for law enforcement agencies to form positive and productive relationships with the communities they serve if those communities do not trust" them or if they "do not believe that the police see their mission as protecting civil rights as well as public safety.").

This cognizance is essential to build public trust in law-enforcement actions and motives. The public trust, in turn, is necessary for effective policing. Public distrust of police leaves both good officers and "Americans, particularly those living in low-income communities and minority communities, more at risk." Edwin Meese III & John Malcolm, *Solutions for Policing in the 21st Century*, HERITAGE FOUND. (Sept. 21, 2017)[4]; see also Edwin Meese III & John Malcolm, *Policing in America: Lessons from the Past, Opportunities for the Future*, HERITAGE FOUND. (Sept. 18, 2017)[5] (identifying

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[2] Available at https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf.

[3] Available at https://ric-zai-inc.com/Publications/cops-p324-pub.pdf.

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[5] Available at http://www.heritage.org/crime-and-justice/report/policing-america-lessons-the-past-opportunities-the-future.

"the breakdown in trust" between citizens and police officers—"which in turn reduces citizen cooperation"—as one of "the most pressing problems that law enforcement agencies face today"); *ibid.* (statement of Garry F. McCarthy, former Superintendent, Chicago Police Department) ("police cannot do their job without * * * understanding" and "trust").

Immunizing egregious officer behavior, however, can only increase tensions between citizens and law enforcement. See Reauthorization of the Civil Rights Div. of the U.S. Dep't of Justice: *Hearing Before the Subcommittee on the Constitution of the Committee on the Judiciary House of Representatives*, 109th Cong. 3 (2005) (prepared statement of R. Alexander Acosta, Assistant Attorney General for the Civil Rights Division, Department of Justice)[6] ("[I]t is of the utmost importance that officers obey the very laws that they enforce. The public must have the trust that no one, including a law enforcement officer, is above the law. Thus, failing to hold officers to account for their conduct, and allowing that trust to be undermined, would make the job substantially more difficult.").

"Strong relationships of mutual trust between police agencies and the communities they serve are critical to maintaining public safety and effective policing * * * * [C]ommunity members' willingness to trust the police depends on whether they believe that police actions reflect community values and incorporate the

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[6] Available at https://www.usdoj.gov/crt/speeches/acosta_2005_oversight.pdf.

principles of procedural justice and legitimacy." U.S. DEP'T OF JUSTICE CMTY. RELATIONS SERV., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: IMPORTANCE OF POLICE-COMMUNITY RELATIONSHIPS AND RESOURCES FOR FURTHER READING 1.[7] This trust between law enforcement and the community can be as fragile as it is important. And "[i]n some cases, a perceived egregious act of misconduct by a single officer in one city not only damages police-community relationships locally; it can gain nationwide attention and reduce trust of the police generally." *Ibid.* Granting immunity to such egregious acts is sure to decrease public trust and confidence in police, which affirmatively harms law-enforcement interests. This Court's review is needed to vindicate these vitally important interests in this case.

II. Permitting The Tenth Circuit's Decision To Stand Would Undermine Vital Law-Enforcement Objectives.

According to the allegations in petitioner's complaint—which must be credited at this stage in the proceedings—the officers in this case actually interrupted their legitimate investigation to "order [her] to stop" praying "so that they [could] * * * harass her." App. 8a; see also App. 13a (officers "order[ed] her to stand up and stop praying so they [could] harass her"). No one disputes that legitimate law-enforcement objectives

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[7] Available at https://www.justice.gov/crs/file/836486/download (last visited Dec. 2, 2017).

may permit—or even require—a police officer to order a citizen to cease praying. The narrow (but exceedingly important) issue presented in this case is whether officers who interfere with prayer for the sole purpose of harassment are entitled to qualified immunity—simply because no case has ever held that they cannot.

Amici readily acknowledge that law-enforcement officers must be able to fulfill their duties free from unnecessary interference. But declining to immunize conduct that intrudes on religious expression solely for the purpose of harassment does not risk any such interference. Here, the Tenth Circuit thought that it was not obviously unlawful for officers to command a person to stop praying for the purpose of harassment solely because police officers could command a subject to "stand up and direct his or her attention to the officer[s]" for the purpose of continuing their investigation. App. 9a. But the legality of law-enforcement actions routinely turns on *why* an officer took an action, i.e., whether there was any justification for it. Reasonable officers would understand that merely because an action may be justified in some circumstances does not mean that the action is justified in all circumstances.

For example, when evaluating whether prison officials can legally interfere with a prisoner's right to pray, courts routinely consider the justification for the prison officials' actions. See *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 353 (1987) (holding that it was reasonable for officials to prohibit prisoners from leaving work to attend religious services for safety

purposes when the prison lacked adequate employee resources); *Turner* v. *Safley*, 482 U.S. 78, 87 (1987) (holding that the analysis depends on whether the government action "is 'reasonably related' to legitimate penological objectives, or whether it represents an 'exaggerated response' to those concerns"); see also *Salahuddin* v. *Goord*, 467 F.3d 263, 279 (2d Cir. 2006) (denying "[s]ummary judgment on the basis of qualified immunity" because "it was clearly established law at the time of the alleged violations that religious exercise may not be denied without any reason"). Thus, in the prison context, law-enforcement officers cannot interfere with prayer unless the interference "is reasonably related to legitimate penological interests." *O'Lone*, 482 U.S. at 349; *Salahuddin*, 467 F.3d at 274. It would be odd, to say the least, to afford citizens like petitioner *less* constitutional protection in their own homes than prisoners enjoy while incarcerated. But that is the unfortunate result of the Tenth Circuit's holding.

It is enough, in this case, that the officers ordered petitioner to stop praying with no justification whatsoever—the allegations belie any concerns for officer safety or any legitimate law-enforcement objectives that petitioner's prayer interfered with. Far from hindering law enforcement, allowing a suspect to engage in a moment of reflection—including prayer—can assist officers in accomplishing a peaceful resolution to a tense encounter, thereby decreasing the risks to officers and the public. As this Court has recognized, encounters between police and citizens can often involve

tense and rapidly evolving situations. See generally *Graham* v. *Connor*, 490 U.S. 386 (1989). De-escalating these situations benefits both law enforcement and the public. As the Department of Justice explained, "the best approach * * * is usually to slow the situation down, so that the officer has more time to * * * assess the situation * * * and formulate a plan for de-escalating the situation." U.S. DEP'T OF JUSTICE CMTY. RELATIONS SERV., COMMUNITY RELATIONS SERVICES TOOLKIT FOR POLICING: GUIDE TO CRITICAL ISSUES IN POLICING 4-5.[8]

In contrast, immunizing officers who interfere with prayer solely to harass a citizen serves no legitimate law-enforcement purpose—if anything, it undermines that vital purpose. This Court's review is needed to restore the balance this Court has struck in its qualified-immunity cases between "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231.

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[8] Available at https://www.justice.gov/crs/file/836416/download (last visited Dec. 14, 2017).

CONCLUSION

The petition for writ of certiorari should be granted, and the judgment of the Tenth Circuit reversed.

December 20, 2017 Respectfully submitted,

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No. 17-742

In the Supreme Court of the United States

MARY ANNE SAUSE, PETITIONER

v.

TIMOTHY J. BAUER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae is the State of Texas. Amicus has a strong interest in the proper application of the qualified-immunity doctrine and is well positioned to comment on the application of that doctrine. The State of Texas is intimately familiar with the crucial role that qualified immunity plays in protecting law enforcement officers from "harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). It is imperative that "insubstantial claims against government officials be resolved prior to discovery." *Id.*

At the same time, amicus recognizes that on the other side of the doctrine's delicate "balance" lies the very weighty "interest[] in vindication of [its] citizens' constitutional rights." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). Qualified immunity, of course, does not shield officers from violating citizens' clearly established rights—that is, when the right in question is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quotations and brackets omitted).

The pleadings in this case allege substantial interference with petitioner's constitutional right to pray in her own home—for no legitimate investigatory

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[1] Pursuant to Supreme Court Rule 37.2, no counsel for any party authored this brief in whole or in part, and no person or entity other than amicus contributed monetarily to its preparation or submission. Amicus provided timely notice of its intent to file this brief, and the parties consented to this filing.

purpose. *See, e.g.*, Pet. App. 19a (Tymkovich, J., concurring) ("If true, Ms. Sause's allegations are inconsistent with any legitimate law enforcement purpose capable of justifying a continuing police intrusion in her home."); *accord* Pet. App. 3a-4a, 17a. Such an action strikes at the heart of the Free Exercise Clause and is a clear constitutional violation.

SUMMARY OF ARGUMENT

The Tenth Circuit erred in affirming the dismissal of petitioner's complaint with prejudice.

Qualified immunity serves an important function in protecting officers from suits alleging conduct that does not violate clearly established rights. Concomitantly, in the rare instances where those clearly established rights are infringed, qualified immunity must necessarily give way. In still rarer circumstances, the alleged conduct is so obviously a clear violation of constitutional rights that there need not be a closely analogous judicial precedent saying as much. On the facts as pleaded by petitioner, this is one of those rare cases.

The application of the correct qualified immunity standard is particularly important in this case, given the right alleged to have been infringed. Petitioner, confronted with officers in her home and a situation that had "quickly devolved," Pet. App. 18a (Tymkovich, J., concurring), began to pray. The officers then stopped her from praying. Pet. App. 4a. By taking solace in prayer, she was invoking a time-honored tradition and religious practice deserving of the highest respect.

Construing the alleged facts in the light most favorable to petitioner, there was no legitimate law

enforcement purpose at stake when the officers ordered petitioner to stop praying. Under these facts as pleaded, it was thus clearly established that the law enforcement officers could not interrupt her private prayer: It was clearly established that her right to pray was protected by the Free Exercise Clause, that an officer's order to stop praying burdens that right, and that an officer needs at least a legitimate governmental reason to justify burdening that right. Existing precedent from the prison context—an environment that affords far less protection of individual rights than one's own home—was sufficient to place this constitutional question "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). This gave the officers fair warning that they could not impede an individual's religious practice without a legitimate reason for doing so.

ARGUMENT

I. In Rare Circumstances, A Right Is So Clearly Violated That Qualified Immunity Should Be Denied Even Without A Judicial Precedent Previously Addressing Comparable, Egregious Facts.

Amicus unequivocally supports the doctrine of qualified immunity. That doctrine serves the vital purpose of "[e]nsuring that those who serve the government do so with the decisiveness and the judgment required by the public good." *Filarsky v. Delia*, 566 U.S. 377, 390 (2012). It protects public officials "not simply from liability, but also from standing trial." *Johnson v. Jones*, 515 U.S. 304, 312 (1995). The doctrine recognizes that allowing frivolous claims, or those not

grounded in clearly established law, to proceed would do harm "not only to the defendant officials, but to society as a whole." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Given the doctrine's "importan[ce]," *id.* at 808, it is both commendable and unsurprising that this Court "often corrects lower courts when they wrongly subject individual officers" to the threat of liability. *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015).

But there are limits to qualified immunity. It represents "the best attainable accommodation of competing values," *Harlow*, 457 U.S. at 814—the "need to vindicate individual rights, on the one hand, and the equally vital need, on the other, that . . . officials exercising discretion will be unafraid to take vigorous action to protect the public interest," *Butz v. Economou*, 438 U.S. 478, 524 (1978). When the alleged unlawfulness is apparent "in the light of pre-existing law"—that is, when the "contours of the right" are "sufficiently clear that a reasonable official would understand that what he is doing violates that right"—officers cannot expect to have their unlawful actions shielded by qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

To be sure, preexisting law must speak "with obvious clarity to the specific conduct in question." *United States v. Lanier*, 520 U.S. 259, 271 (1997). This often means that the plaintiff must identify a case or cases in which "the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). But in rare circumstances where officials' conduct strikes at the heart of a clearly protected constitutional right,

"officials can still be on notice that their conduct violates established law" even when the particular factual allegations are somewhat "novel." *Id.* at 741. This is one such rare circumstance.

Taking the allegations in Ms. Sause's complaint as true, no reasonable officer could have believed that he had the right to stop her from exercising her constitutional right to pray (particularly in the comfort of her own home) without any legitimate investigatory purpose. *Contra* Pet. App. 8a (holding that the officers could reasonably have believed that they were allowed "to order the individual to stop engaging in religiously-motivated conduct so that they can . . . briefly harass her before . . . issuing a citation [unrelated to the prayer and to their initial investigation]"). Although no case appears to have dealt with these precise facts, the contours of petitioner's legal right were clearly spelled out to put the officers on notice. It is true that no other court has had occasion to address the novel facts pleaded here—where an officer orders an individual in her own home to stop praying merely to harass her long after any legitimate purpose of the investigation had concluded. But that does not render this any less an "obvious case" of improper police action that strikes at the heart of a clearly established constitutional right. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *accord Hope*, 536 U.S. at 738; *Lanier*, 520 U.S. at 271.

II. It Is Clearly Established That An Officer Must, At A Minimum, Have Some Valid Law Enforcement Purpose Before Ordering A Person To Stop Praying.

At issue here is the fundamental right of an individual to pray in her own home, unrestricted by government officials whose legitimate investigation had already run its course under the facts as pleaded.[2] It is clearly established that an officer must have at least some valid justification before interfering with an individual's free exercise of religion. Under the facts pleaded by petitioner, any reasonable basis the officers might have had to stop Ms. Sause from exercising her constitutional right to pray had ceased by the time they directed her to stop praying. *See, e.g.*, Pet. App. 9a (observing that the officers' actions "immediately after issuing [the command to stop praying did] nothing to further their investigation"); Pet. App. 17a (Tymkovich, J., concurring) (explaining that "an initially justified police encounter" was "prolonged beyond the time reasonably required to complete the legitimate police objective justifying the encounter" and that "the officers' actions [were] not reasonably related in scope to that legitimate objective").[3]

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[2] As pleaded, the facts of this case may very well also establish a Fourth Amendment violation. *See* Pet. App. 17a-19a (Tymkovich, J., concurring). But that fact does not negate the separate First Amendment violation, and petitioner as the plaintiff was entitled to raise or omit whatever claims she wished.

[3] In contrast, if an individual were to use her right to pray actively to interfere with a legitimate ongoing investigation by

Nevertheless, the court of appeals granted qualified immunity on the basis that Ms. Sause's factual allegations were neither "obviously egregious," Pet. App. 9a, nor reflected in a closely analogous case, Pet. App. 8a. The court erred in doing so.

To defeat qualified immunity, this Court does "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. This is one of those rare cases where, even if the issue has not presented itself in highly similar factual circumstances, well-established precedent has still placed the constitutional question beyond debate.

At the time this case arose, it was clearly established that the right to pray was protected by the Free Exercise Clause, and any reasonable officer would have known that ordering someone to stop praying without any investigatory justification (*see* Complaint at 8, *Sauce v. Bauer*, 2016 WL 3387469 (D. Kan. 2016) (15-cv-9633), ECF No. 1; *see also* Pet. App. 4a, 18a) was a clear constitutional violation.

A. A reasonable officer would have understood that the constitutional right to pray is clearly established.

It is clearly established that the right to pray is protected by the Free Exercise Clause. *See, e.g.*, *Wallace*

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ignoring questions or orders reasonably related to that investigation, the result would be different. *See infra* Part II.B (discussing the standard for justifying the burden). Those are not the facts alleged here. *See* Pet. App. 3a-4a, 17a, 19a.

v. Jaffree, 472 U.S. 38, 59 (1985) (referring to a student's ability to pray personally as a "right"); *accord, e.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (recognizing that one's ability to pray in accord with religious dictates implicates constitutional rights and requiring, in the prison context, that any burden on that right was reasonably related to legitimate penological interests).

The court of appeals correctly assumed that the Free Exercise Clause clearly establishes the right to pray. *See* Pet. App. 6a-7a. And there are few freedoms so enshrined as the right to practice one's religion as one sees fit. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) ("[The Constitution] specifically and firmly fixed the right to free exercise of religious beliefs."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("[The] freedom to worship one's Maker according to the dictates of one's conscience [is] a right which the Constitution specifically shelters."). Given the importance of religious freedom, this Court has recognized that "[t]he values underlying [the First Amendment] provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Yoder*, 406 U.S. at 214. And of all the acts that could be considered religious exercise, it is hard to conceive of a more quintessentially religious act than an individual praying.

Prayer is inextricably linked to the very founding of this Nation. When interpreting the scope of the Religion Clauses, this Court has observed that "the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as [Jefferson's 1785 Virginia Bill for Religious Liberty]." *Everson v. Bd. of Ed. of Ewing Twp.*, 330 U.S. 1, 13 (1947). That Virginia law defined religion as "the duty which we owe to our Creator, and the manner of discharging it." Va. Const. art. I, § 16. In the debates surrounding the passage of the Virginia Bill for Religious Liberty, James Madison emphasized that even those opposed to the civil establishment of religion, like him, were nevertheless "earnestly praying" that lawmakers "may establish more firmly the liberties, the prosperity, and the Happiness of the Commonwealth." James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), reprinted in II *The Writings of James Madison* 191 (Gaillard Hunt ed., The Knickerbocker Press 1901); *see Everson*, 330 U.S. at 71-72 (including as an appendix Madison's *Memorial and Remonstrance*).

In fact, at a crucial moment during the Constitutional Convention of 1787, when tensions were high and differences seemed intractable, Ben Franklin implored his fellow delegates to look to God to provide them the strength to see through their important task: "I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every

morning before we proceed to business." I Max Farrand, *The Records of the Federal Convention of 1787* 452 (New Haven: Yale Univ. Press 1911) (James Madison's Notes on the Convention for June 28, 1787). The Convention heeded Franklin's call; from then on, its daily activities opened with a moment of prayer. *Id.* This tradition continues in large part to this day. *See, e.g., Town of Greece v. Galloway*, 134 S. Ct. 1811, 1818 (2014).

Presidents, too, have long turned to prayer to guide the country. In the Nation's very first inaugural address, President Washington asked all to give "fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect." George Washington, *First Inaugural Address in the City of New York* (Apr. 30, 1789), in 101st Congress, *Inaugural Addresses of the Presidents of the United States*, S. Doc. 101-10, at 2 (1989). Inaugurations have included public prayer ever since. *See* Lt. Steven R. Obert, *Public Prayer in the Navy*, 53 Naval L. Rev. 321, 341 n.137 (2006).

In sum, this is "a Nation whose people turn to prayer in times of our most heartfelt sorrow and our moments of greatest joy." Proclamation No. 7672, 68 Fed. Reg. 23,829 (Apr. 30, 2003). A reasonable officer therefore would have known that the right to pray in one's own home in this Nation was clearly established.

B. A reasonable officer would have understood that stopping an individual from praying, without a legitimate purpose for doing so, impermissibly burdens a constitutional right.

It is likewise clearly established that the government may not infringe on rights protected by the Free Exercise Clause absent a legitimate, non-arbitrary interest. Many of the cases discussing the need for a legitimate governmental interest to prevent the free exercise of religion have arisen in the prison context. *See* Pet. 25-27. It is, thankfully, still "novel" (*Hope*, 536 U.S. at 741) to have officers intrude into people's homes and infringe on their free exercise rights, as was alleged here. But if a prisoner would have had a right to pray because there was no countervailing legitimate governmental interest to prevent the prayer, then a non-incarcerated individual not subject to arrest (and in her own home at that) clearly has such a right as well.

Incarceration, after all, necessarily entails "conditions [that] are restrictive and even harsh . . . [as] part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Because of the need to maintain order, "prison officials must be accorded latitude in the administration of prison affairs" and "prisoners necessarily are subject to appropriate rules and regulations." *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (per curiam); *see Bell v. Wolfish*, 441 U.S. 520, 557 (1979) ("[G]iven the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope.").

But even in the prison environment with necessarily curtailed rights, this Court has held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid [only] if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). As a result, such a prison "regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89-90. Furthermore, the underlying "governmental objective must be a legitimate and neutral one." *Id.* at 90.

The well-established existence of this "reasonably related to [a] legitimate ... interest[]" (*id.* at 89) standard should have given the officers here reasonable notice at least of this baseline for unacceptable conduct in an individual's home. It is hard to imagine an environment accorded greater protection—far more than a prison cell—than the privacy of a person's home. The sanctity of one's home has deep roots in the common law. It is the "prototypical" area of "protective privacy." *Kyllo v. United States*, 533 U.S. 27, 34 (2001). There is little more important than "the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961); *accord Carey v. Brown*, 447 U.S. 455, 471 (1980) ("Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.").

Accordingly, if the government must have a legitimate penological interest to infringe the free

exercise rights of a convicted criminal in prison, then law enforcement interacting with a presumptively innocent individual in her own home obviously needed, at a minimum, a legitimate law enforcement interest to infringe her free exercise rights. That much should have been clear to the officers, regardless of whether the Tenth Circuit or any other court had confronted these precise pleaded facts before.

Once cases from the prison context are appropriately taken into consideration, there is a weight of circuit authority clearly establishing that an order to stop praying without a legitimate governmental justification unconstitutionally burdens the free exercise of religion.

The Tenth Circuit itself has had occasion to address the required justification for burdening prayer in the prison setting. In *Ghailani v. Sessions*, the plaintiff alleged that prison policies hindered his ability to pray Jumu'ah, a Muslim prayer practice. 859 F.3d 1295, 1304 (10th Cir. 2017). The court observed that "a prisoner alleging a violation of his First Amendment rights must include sufficient facts to indicate the plausibility that the actions of which he complains were not reasonably related to legitimate penological interests." *Id.* (internal quotations omitted). Ultimately, the court upheld the dismissal of the prisoner's First Amendment claims, but only because he failed to plead the lack of a legitimate penological interest. *See id.*

Decisions from other courts of appeals—even if they do not control the qualified-immunity inquiry because

this case arose from the Tenth Circuit[4]—further support just how obvious it is that the government must have a legitimate justification to impede an individual's prayer. In *Mack v. Warden Loretto FCI*, for instance, the Third Circuit held that qualified immunity was unwarranted because it first needed to be determined whether there was a reasonable penological interest justifying a substantial burden on the plaintiff prisoner's religious exercise. 839 F.3d 386, 304 (3d Cir. 2016). The prisoner there had alleged that an officer's anti-Muslim harassment "caused him to stop praying." *Id.*

The Eleventh Circuit in *Johnson v. Brown* reached a similar conclusion. 581 F. App'x 777 (11th Cir. 2014) (per curiam). There, the plaintiff "alleged two specific instances in which prison officials interrupted [his]

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[4] In the Tenth Circuit, a right is clearly established "when a Supreme Court or Tenth Circuit decision is on point, or if the clearly established weight of authority from other courts shows that the right must be as the plaintiff maintains." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). Other circuits take different approaches. *See, e.g.*, *Stephens v. DeGiovanni*, 852 F.3d 1298, 1316 n.14 (11th Cir. 2017) ("In this circuit, the law can be clearly established for qualified immunity purposes only by decisions of the U.S. Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose."); *Hill v. Crum*, 727 F.3d 312, 322 (4th Cir. 2013) ("In determining whether a right was clearly established at the time of the claimed violation, courts in this circuit ordinarily need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the cases arose. . . . If a right is recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense.").

prayers and ordered him to stop praying and leave." *Id.* at 779. Deeming the plaintiff's free exercise claim "plausible on its face," the court held that the district court clearly erred by granting qualified immunity because "the facts surrounding the defendants' justification for their alleged interference with [plaintiff's] religious practices must still be developed before a determination can be made as to whether the defendants acted reasonably" under the circumstances. *Id.* at 781; *see also Thomas v. Gunter*, 32 F.3d 1258, 1260-61 (8th Cir. 1994) (holding that because a material issue of fact existed as to whether refusal to allow inmates daily access to a sweat lodge for prayer was reasonably related to a legitimate penological objective, the district court erred in granting prison officials qualified immunity); *Hadi v. Horn*, 830 F.2d 779, 784 (7th Cir. 1987) (applying the test of "whether a valid connection exists between the regulation and a legitimate government interest" where plaintiff prisoners alleged that their First Amendment rights had been violated by the defendant's cancellation of their prayer service).

It is thus crystal clear that there must, at a minimum, be *some* "reasonable justification in the service of a legitimate governmental objective" to burden the free exercise of religion. *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Otherwise, the rights specifically protected in the First Amendment would be rendered a nullity.

Here, however, there was no justification for the officers to order Ms. Sause to stop praying, under the facts alleged. In such circumstances, a reasonable officer would know that the Free Exercise Clause clearly

establishes that the officer cannot stop an individual from praying.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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